(23,990)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 320.

THE EASTERN RAILWAY COMPANY OF NEW MEXICO, THE PECOS & NORTHERN TEXAS RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. LITTLEFIELD, J. P. WHITE, AND THOMAS D. WHITE, COMPOSING THE FIRM OF LITTLEFIELD CATTLE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

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1-10 *Caption.*

THE STATE OF TEXAS,
County of Deaf Smith:

At a Term of the District Court, begun and holden at Hereford, within and for the County of Deaf Smith, before the Honorable D. B. Hill, and ending on the 30th day of November, 1909, the following case came on for trial, to-wit:

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
THE EASTERN RAILWAY COMPANY OF NEW MEXICO et al.

* * * * * * *

11 *Plaintiffs' First Amended Original Petition.*

Filed November 1, 1909.

In the District Court of Deaf Smith County, Texas.

GEO. W. LITTLEFIELD et al.
vs.
EASTERN RAILWAY CO. OF N. M. et al.

To said Honorable Court:

Come now Geo. W. Littlefield, J. P. White and Thomas D. White, plaintiffs in the above entitled cause and leave of the court being first had, file this their first amended original petition amending their original petition filed herein on the 23rd day of March, 1908, so that same shall hereafter read as follows, to-wit:

THE STATE OF TEXAS,
County of Deaf Smith:

In the District Court of said County.

To the Honorable James N. Browning, Judge of said Court:

12 Come now George W. Littlefield, J. P. White and Thomas D. White, composing the firm of Littlefield Cattle Company, hereinafter styled Plaintiffs, and complaining of the Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas and the Atchison, Topeka & Santa Fe Railway Company, hereinafter styled Defendants, respectfully represent and show to the Court as follows, to-wit:

First.

Plaintiff George W. Littlefield, resides in Austin, Travis County, Texas; plaintiffs J. P. White and Thomas D. White reside in Chaves County, New Mexico, and they are citizens of said County and Territory; George W. Littlefield is a citizen of Texas. The defendants above named are now and for many years they have been common carriers of freight and passengers and are and have been engaged as such carriers in the transportation of such freights and passengers between points and stations on their respective lines of railway. The Eastern Railway Company of New Mexico is a corporation, duly incorporated under and by virtue of the laws of New Mexico as a common carrier, with its principal offices and officers located at Amarillo, in Potter County, Texas; The Pecos & Northern Texas Railway Company is a corporation duly incorporated as a common carrier under the laws of the State of Texas, having its principal offices and officers located at Amarillo, Texas; The Southern Kansas Railway Company of Texas is a corporation duly incorporated as a common carrier under the laws of the State of Texas, with its principal offices and officers located at Amarillo, Texas; The Atchison, Topeka & Santa Fe Railway Company is a corporation duly incorporated as a common carrier under the laws of the States of Missouri and Kansas, with its principal offices located at Topeka, Kansas; and said defendant Company has and maintains one of
13 its division offices in charge of one of its division superintendents at Amarillo, Potter County, Texas.

Plaintiffs charge that said defendants now own and operate, and for many years they have owned and operated a line of railway extending from and through the City of Roswell in New Mexico, through the station of Kenna in said Territory, to and through the station of Bovina, in Parmer County, Texas, and to and through the City of Hereford, in Deaf Smith County, Texas, and thence to and through the City of Amarillo, in Potter County, Texas, and thence to and through the station of Higgins, in the State of Oklahoma and thence through the states of Oklahoma, Kansas and Missouri, to the City of Kansas City, Missouri, and to and into the City of St. Joe, Missouri. That part of said line of Railway extending through said territory of New Mexico, through the City of Roswell and through said station of Kenna to the town and station of Texico on the line of said Territory and the State of Texas is known and designated as The Eastern Railway of New Mexico, and the same is ostensibly operated in the name of the New Mexico Corporation above named. That part of said line extending from Texico through Hereford to Amarillo is designated as the Pecos and Northern Texas Railway, and same is ostensibly operated in the name of said Pecos & Northern Texas Railway Company. That part of said line of railway extending from Amarillo, Texas, to Higgins, Oklahoma, is known and designated as the Southern Kansas Railway of Texas, and same is ostensibly operated by said Southern Kansas Railway Company of Texas. That part of said line of

railway extending from Higgins to the Cities of Kansas City and St. Joe is known as the Atchison, Topeka & Santa Fe Railway.

Plaintiffs charge that each and all of said lines of railway
14 constitute and for many years they have constituted a single, through, connected and continuous line of railway between all the points above named. In truth and in fact said lines of railway are now and for many years they have been operated by said defendants as one continuous through line of railway, and said defendants are now engaged and for many years they have been engaged in so operating said lines of railway as agents and partners each of the others; and in so operating said lines of railway said defendants are acting and for many years they have been acting as such agents and partners and as connecting carriers.

Plaintiffs charge that in truth and in fact said Atchison, Topeka and Santa Fe Railway Company owns and operates all of said lines of railway; that it is the parent and dominant corporation and it dominates and controls its co-defendants, and each and all of such co-defendants are in truth and in fact mere auxiliary and subordinate corporations which were organized and incorporated under the supervision and control of such dominant and parent company, as a means whereby it would be enabled to carry on its business in Texas and New Mexico. Yet plaintiffs say that said New Mexico Corporation is a citizen of said Territory and said Texas corporations are citizens of the State of Texas; but each and all of said lines of railway are organized and operated together as parts of what is known as the Santa Fe System of railways, and that part of said system which extends through the State of Texas and the Territory of New Mexico is known and operated as the "Panhandle Division and Pecos Valley Lines," all of which are under the control and supervision of defendants' division officers; located at Amarillo, Texas. Avery Turner, who resides in said last named city is the division superintendent of said Atchison, Topeka & Santa Fe Railway Company at said point, and he is also the general super-
15 intendent of each and all of the other defendants herein all of which are represented and controlled by the same general officers, who control such proportion in subordination to the wishes and instructions of said dominant and parent company.

Plaintiffs say that on, to-wit, the 9th day of May, 1907 said defendants had and maintained at said station of Bovina a station agent, who was authorized to act for and represent said defendants at such station, and said defendants have kept and maintained such agent at said station ever since said date; that the name of such agent, as they are advised and believe is Merrill; but his initials or Christian name is to plaintiffs unknown, but such name is known to defendants; that defendants also have an agent at Hereford, in Deaf Smith County, Texas, in the person of J. W. Lacey, who resides in said County and who sells tickets and bills freight for defendants over all the lines of said defendant, to all points on such lines.

The said defendants now operate, and for many years they have operated through trains over said lines of railway, across the line of

the State of Texas and the Territory of New Mexico; between Roswell in said Territory, and Amarillo, Texas, and all intermediate points; and on said 9th day of May, 1907, said defendants kept and maintained at Kenna, New Mexico, stock pens and loading chutes, wherein it received for shipment over said lines of railway live stock, such as cattle, horses, and other live stock, but at that time defendants had no agent at said point to transact its business there, such business being transacted from other stations on said lines whereat defendants kept agents.

Thereafter, to-wit, on the first day of September, 1907, said defendants had and kept at said station of Kenna, a station
16 agent who was authorized to act for them in the transaction of their business at such station, and defendants have kept such agent at said station ever since said date. The name of such agent is unknown to plaintiffs, but same is known to defendants.

Plaintiffs further say that on, to-wit, the ninth day of May, 1907, and for a long time prior thereto, and ever since said date, plaintiffs were engaged under the firm name of the Littlefield Cattle Company, in raising, buying, selling, and shipping cattle on and from their ranches in Northwest Texas and New Mexico.

Second.

For cause of action, plaintiffs say and show to the court as follows, viz: On, to-wit, the ninth day of May, 1907, they owned a large number of cattle which were located on their said ranches and which they desired to thereafter ship in the months of September and October over defendants' lines of railway from said stations of Bovina and Kenna to St. Joe and Kansas City, Missouri, or to one of said places as plaintiffs might thereafter determine; that on said May 9th plaintiffs made application to defendants, through their said station agent at said station of Bovina, for two hundred (200) stock cars wherein to ship their said cattle, fifty (50) of which cars plaintiffs requested defendants to furnish for loading at said station on, to-wit, the fifteenth day of September, 1907, and fifty (50) more of such cars at same station on October 15, 1907; fifty (50) more of such cars plaintiffs requested defendants to furnish at the station of Kenna on, to-wit, September 1st, 1907, and the remaining fifty (50) cars plaintiffs requested defendants to furnish at said station of Kenna on, to-wit, the 15th day of September, 1907. Plain-
17 tiffs made said application on application blanks furnished by defendants for that purpose, and such application blanks when filled out by plaintiffs were delivered to and received by defendants' said station agent, by whom they were promptly transmitted to defendants' general and division offices at Amarillo. Said applications so made by plaintiffs for said cars are now in the possession of defendants, their agents and servants, and the defendants are now here notified to produce same on the trial of this cause, or secondary evidence of their contents will be offered. The contents of said applications as stated in said forms are known to defendants and are unknown to plaintiffs. Said stations of Bovina and Kenna

are about fifty miles apart on said lines of railway and defendants were accustomed to receiving such orders and applications for such cars to be furnished at said station of Kenna, at said station of Bovina. Defendants were then and there also accustomed to transferring such cars when ordered for one of said stations to the other, when requested so to do by the person ordering same. Said defendants received and accepted said applications and orders for said cars soon after plaintiffs made same and defendants thereupon became bound to furnish same to plaintiffs as requested. About the latter part of July, or the first part of August, 1907, defendants, acting through said Avery Turner, requested plaintiffs not to bring their said cattle to said stations to be loaded until they were notified by defendants so to do. On receiving such notice, plaintiffs refrained from bringing in their said cattle to be shipped until on, to-wit, the 10th day of September, 1907, when learning that some cars would be at said station of Kenna, about that day, they brought in and shipped from said station, soon thereafter, twenty-eight (28) car loads of said cattle, consisting of about one thousand three
18 (1,003) head. Plaintiffs thereupon requested and demanded of defendants, through their said agent at Kenna, and through said Avery Turner at Amarillo, that said defendants should furnish to plaintiffs at said station of Kenna, on, to-wit, the 15th day of September, 1907, the remainder of the one hundred (100) cars which they had ordered for said station as above set out. Plaintiffs also then and there requested and notified defendants through their said agents to transfer and deliver for plaintiffs' use, the one hundred (100) cars which they had ordered for said station of Bovina to said station of Kenna, same to be delivered at said last named station, on, to-wit, the 15th day of October, 1907. Defendants then and there accepted said order and notice, and they had ample time after receiving such notice and order, to procure and furnish said cars as requested. Plaintiffs charge that by reason of the facts above stated defendants became bound, and it was their duty to furnish to plaintiffs said cars so ordered as aforesaid at said station of Kenna as follows, viz: One hundred cars on, to-wit, September 15, 1907, and one hundred (100) cars on, to-wit, October 15, 1907. Yet so to do, defendants negligently and carelessly failed, save and except that they did furnish for plaintiffs' use at said station twenty-eight (28) cars as above stated.

Plaintiffs aver that defendants did not then and there inform or notify plaintiffs that they could not furnish such cars; but on the contrary defendants notified plaintiffs from time to time that they expected to be able to furnish such cars within a short time.

Plaintiffs say that relying on the duties imposed by law on defendants and upon their promises to procure such cars for plaintiffs' use, they on, to-wit, about the 9th day of September, 1907,
19 brought to said station for shipment, about 3,900 head of their said cattle, which they then and there tendered to defendants for shipment. Defendants then and there refused to receive or accept said cattle and refused to ship same and they negligently refused to furnish plaintiffs cars wherein to ship said cattle,

and plaintiffs were thereupon forced to hold said cattle under herd near said station for several weeks awaiting the arrival of cars wherein to ship same. Defendants carelessly and negligently failed to furnish for plaintiffs' use cars wherein to ship said cattle and for want of such cars said defendants refused to receive said cattle for shipment, and plaintiffs were compelled to hold same under herd on the range near said station while awaiting for such cars.

Plaintiffs charge; that they were forced to hold and keep their said cattle under herd and they did so keep same there until on, to-wit, the 18th day of October, 1907, when they learned for the first time definitely that defendants would not furnish cars wherein to ship said cattle, until several weeks thereafter. Whereupon, plaintiffs were forced to abandon, and they did abandon their purpose of shipping said cattle during that season and to return same to their ranch in Texas, which was distant from said station about 100 miles. That plaintiffs' said cattle so tendered to defendants consisted of 2,817 head of cows, 850 head of calves, 173 head of bulls and 60 head of steers, and same were tendered to defendants for shipment from day to day, while being held as aforesaid near Kenna Station, and plaintiffs then and there were ready and willing to pay and offered to pay defendants the customary and legal freight charges for the transportation of said cattle. Said cattle were to be shipped for immediate sale on the market at St. Joe and Kansas City, which fact was then and there known to defendants.

But defendants wholly failed and refused to ship the said cattle, or any part thereof.

Plaintiffs further charge that had defendants furnished cars to transport said cattle as requested by plaintiffs 2,817 head of same, consisting of cows, would have been transported by defendants to either Kansas City or St. Joe, or partially to each of said points, and upon arrival there would have been sold upon the market for the net sum of $56,340, after deducting and paying all freight charges and expenses, and 850 of same, consisting of calves, would have been likewise transported to either Kansas City or St. Joe, or partially to each of said points, and upon arrival there would have been sold upon the market for the net sum of $7,650, after deducting and paying all freight charges and expenses, and 173 head of same, consisting of bulls, would have been likewise transported to either Kansas City or St. Joe, or partially to each of said points, and upon arrival there would have been sold upon the market for the net sum of $5,190, after deducting and paying all freight charges and expenses, and 60 head of same, consisting of steers, would have been likewise transported to either Kansas City or St. Joe, or partially to each of said points, and upon arrival there would have been sold upon the market for the net sum of $2,700, after deducting and paying all freight charges and expenses, which several sums of money the said cows, calves, bulls and steers would have been reasonably worth upon the market upon their arrival at either of said points.

That the 2,817 head of cows which plaintiffs would have shipped and sold as aforesaid, were reasonably worth upon the market at

21 & 22 Kenna, New Mexico only $28,170, and the 850 head of calves which plaintiffs would have shipped and sold as aforesaid were reasonably worth upon the market at Kenna, New Mexico, only $4,250, and the 173 head of bulls which plaintiffs would have shipped and sold as aforesaid were reasonably worth upon the market at Kenna, New Mexico only $2,941, and the 60 head of steers which plaintiffs would have shipped and sold as aforesaid were reasonably worth on the market at Kenna, New Mexico, only $1,500, and plaintiffs were deprived of profits by defendants' failure and refusal to ship the same, in the sum of $35,019, in which sum plaintiffs were damaged by defendants' said delict and negligence.

That said cattle were brought to Kenna station for shipment on September 9th, as aforesaid, and were held there from day to day until October the 18th following, whereupon plaintiffs were compelled to return said cattle to the range, by reason of defendants' failure to transport the same, and during all the time the cattle were so held at Kenna, plaintiffs were put to great trouble and expense in that they were compelled to employ and pay men to herd and guard said cattle and were compelled to purchase food and supplies for the maintenance of said men and cattle; all to their great damage in the sum of $2,000.

Premises considered, plaintiffs sue and pray that defendants be cited to appear and answer their petition and on final hearing hereof, they pray for judgment for their said damages, with interest thereon, for all costs of suit and for such other and further relief as they may show themselves entitled to.

J. A. TEMPLETON,
SCOTT & DUNN,
Attorneys for Plaintiffs.

Filed November 1, 1909. W. M. Cogdell, Clerk District Court, Deaf Smith County.

* * * * * * *

23 *Original Answer of P. & N. T. Ry. Co.*

Filed May 25, 1909.

In the District Court of Deaf Smith County, Texas.

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
THE EASTERN RY. CO. OF N. M. et al.

Now comes defendant, The Pecos & Northern Texas Railway Company, and answers herein for itself only by demurrers and pleas in order herein presented, as follows:—

I.

This defendant demurs to the jurisdiction of this court, and says this court is without jurisdiction to hear and determine the matters in controversy herein for this: Plaintiffs sue and seek to recover damages for a failure of the Eastern Railway Company of New Mexico to furnish cars by them demanded of it for the transportation of cattle over and beyond its line and over the lines of the other defendants, interstate, from Kenna, New Mexico, a station on their line of the Eastern Railway Company of New Mexico, in the territory of New Mexico, to Kansas City or Saint Joseph in the state of Missouri; and plaintiffs have no legal right, neither at com-
24 mon law nor by state statute, to demand and have furnished to it by either of defendant cars to be used in transporting cattle beyond its respective line; but such right of action, if any, plaintiff has for a failure to furnish cars to go interstate and beyond the initial carrier's line, or the line of any carrier in order, is given and created by the Interstate Commerce law, which vests in the United States courts exclusive jurisdiction to hear and determine such causes.

Of all of which this defendant prays the judgment of the court, for costs, etc.

II.

This defendant demurs to plaintiffs' petition and says the same is insufficient in law and of this it prays the judgment of the court, for costs, etc.

III.

By way of further and special demurrers herein this defendant says that plaintiffs' petition is insufficient as follows:—

1. All those parts of said petition which allege the relationship of defendants to each other and their relative interests in the alleged lines of road from Kenna, New Mexico, to Kansas City and St. Joseph, Mo., except in so far as a partnership is alleged, is insufficient in law to show any liability of this defendant for the acts of the other defendants, or either of them, or the liability of any or either of the other defendants for the acts of this defendant; and it appears therefrom that the acts of only the Eastern Railway Company of New Mexico are complained of.

2. All those parts thereof which seek to allege that the defendant, The Atchison, Topeka & Santa Fe Railway Co. is the owner
25 of the other defendants and the dominant Company, controlling the other defendant companies, is insufficient to show any liability of this defendant for the acts of the Atchison, Topeka & Santa Fe Ry. Co. or liability of that Company for the acts of this defendant; in that it is not shown wherein nor how the Atchison, Topeka & Santa Fe Ry. Co. controls this defendant, nor that it has any controlling influence or interest in this defendant company, other than would be incident to its ownership of stock certificates of this company and its acts as a stockholder, which would not make this defendant liable for the acts of the Atchison, Topeka & Santa Fe

Ry. Co., nor would it make the Atchison, Topeka & Santa Fe Ry. Co., as a Company, liable for the acts of this defendant.

3. Those parts of said petition which allege that *that* the Atchison, Topeka & Santa Fe Ry. Co. is the owner of the other defendant Companies and controls them is inconsistent and contradictory with the allegation that the defendants are each and all partners and as partners agents each for the others.

4. Those parts of said petition which allege that defendants are agents for each other, are insufficient, in that, it is not shown of what the agency consists, nor wherein, or how, each sustains the relationship of agent to the other, and vice versa.

4*a*. Those parts of said petition which seek to allege orders for cars are insufficient, in that, it is not shown that any particular cars were ordered for any particular run and to go to any particular point, so that defendants could provide cars accordingly and be advised as to what is to be proven.

6. All those parts of said petition which seek to set up and allege damages sustained are insufficinet; in that; (*a*) They are
26 too remote, speculative and uncertain; (*b*) There are no facts showing that the alleged failure to furnish cars destroyed or lessened the actual market value of the cattle in question; (*c*) no other facts are alleged showing or affording a correct basis for estimating any damages recoverable at law.

Of all of which this defendant prays the judgment of the court for costs, etc.

IV.

This defendant denies all and singular the allegations in plaintiffs' petition contained and demandes strict proof of the same. Wherefore, it puts itself upon the country and prays the judgment of the court, for costs, etc.

By way of further and special answer herein this defendant sets up the following, to-wit:

1. This defendant denies that the defendants were at the time of the transaction alleged in plaintiffs' petition, have ever since been, or are now, partners in business, and shows to the court that they were not then, have never since been and are not now partners as alleged by plaintiffs. All of which defendants are ready to verify.

2. This defendant shows to the court that the request and demands for cars, alleged by plaintiffs to have been made by them, were unreasonable and the defendants and *and* each of them were entirely unable to comply with such request and demands, and they are not liable for not having complied with the request if they, or either of them, did fail to furnish cars within such time as alleged, for this: Defendant's said lines of road and parts thereof over which plaintiff desired to ship were originally constructed and equipped in view of the *ship were originally constructed and equipped in view of the* conditions of the country as they then existed, and a reasonably rapid development thereof, and for a long time had been used
27 and, from time to time, improved so as to handle the property offered to said several lines for transportation, which purpose

their several lines served reasonably well and sufficiently until some time about the — day of ——, 1907, when there suddenly developed an unprecedented rush of people to the southwest buying lands, making homes, and developing the country. There was thereby created an unprecedented and unusual demand for transportation facilities to transport passengers and freight of all kind, including live stock, over defendants' *and freight of all kind, including live stock, over defendants'* lines and connection lines and as well throughout the entire country, especially the southwest, making such excessive, unusual and unprecedented demand for motive power, cars, tracks and facilities as that the same not only was not anticipated but could not reasonably have been anticipated and foreseen by defendants or either of them.

Such demands and developments were such as that, for some time prior to the time plaintiffs made demand for such stock cars and the transportation of said cattle, the defendants The Pecos & Northern Texas Ry. Co., the Southern Kansas Ry. Co. of Texas, and the Atchison, Topeka & Santa Fe Ry. Co. had been compelled to undertake, and had undertaken to reconstruct those parts of their lines over which it was necessary to have transported said cattle and improve the same by cutting down grades, straightening curves, build stouter bridge, installing more and better and heavier equipment, putting in more and longer sidings and passing tracks and otherwise improving said properties, so as to meet such new and unexpected demands for transportation and transportation facilities; and, at the time of such demands, they were at great cost and expense, engaged in making such betterments, so required and made necessary by the unexpected rapid development of the country.

28 In addition thereto, the demands for motive power, cars, labor, and the like, was so great throughout the country that it was not only impracticable but impossible for defendants or either of them to have provided at the time said *said* cars were so demanded by the plaintiffs, such cars and motive power and transportation for said cattle; and there were at said time and times, various and divers other persons, firms and corporations demanding cars and transportation facilities, and defendants were by law required to do so and were furnishing such cars and transportation in the order of demands made, without discrimination as between the parties making such demands, and it was impossible for them to have furnished said cars at the times requested and then transported plaintiffs' said cattle without neglecting other demands and discriminating against other persons and firms, contrary to the provisions of said Federal law regulating Interstate Commerce.

All of which defendants are ready to verify.

Wherefore, defendant prays the judgment of the court, discharging it to go hence without day, for costs and for general relief.

TERRY, CAVIN & MILLS,
MADDEN, TRULOVE AND KIMBROUGH, AND
CARL GILLILAND,
Attorneys for said Defendant.

The undersigned, being duly sworn on oath states that the above and foregoing special answers No. One, denying partnership, is true in substance and fact.

W. A. BROWN,
Agent for the S. K. of T. Ry. Co.

Subscribed and sworn to before me this 24th day of May, 1909.

[SEAL.] R. E. DORSEY,
Notary Public, Potter County, Texas.

Filed May 25, 1909. W. M. Cogdell, District Clerk.

29 *Answer of the E. Ry. Co. of N. M.*

Filed November 1st, 1909.

In the District Court of Deaf Smith County, Texas.

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
THE EASTERN RAILWAY COMPANY OF NEW MEXICO et al.

Now comes the defendant, The Eastern Railway Company of New Mexico, and (without in any manner waiving its plea of privilege filed herein, but answering under the judgment and order of the court requiring it so to do) answers herein as follows, to-wit:

1. This defendant adopts and relies thereon as its own and as though fully written out herein, in order, the several demurrers, and pleas of its co-defendant, The Pecos & Northern Texas Railway Company, save and except in so far as modified or limited by the special pleas hereinafter set up and contained; and it prays the orders and judgments of the courts accordingly, in the order, manner and form as its said co-defendant.

2. By way of further special answer, this defendant sets up the following, to-wit:

This defendant is not and was not at and prior to the time of the alleged transactions in plaintiffs' petition, specified and owner of or operating lines of railway interstate, but it is and was a local line, located and operating within the limits of New Mexico, being a New Mexico corporation only and by law required to maintain only such facilities as will be reasonably required and necessary to carry on the business of its own line. As such corporation and carrier, this
30 defendant had a right to refuse to furnish cars demanded for use beyond its line, interstate, and over the lines of other companies to Saint Joseph and Kansas City, and it is in no manner liable for having failed or refused, if it did fail or refuse, so to furnish cars for such interstate shipment and to be used beyond its own line.

All of which this defendant is ready to verify.

Wherefore, it prays the judgment of the court, for costs, and for general relief.

W. C. REID,
MADDEN, TRULOVE & KIMBROUGH, AND
CARL GILLILAND,
Attorneys for said Defendant.

Filed Nov. 1, 1909. W. M. Cogdell, Clerk of District Court, Deaf Smith County, Texas.

Answer of S. K. Ry. Co. of Texas and A., T. & S. F. Ry. Co.

Filed November 1st, 1909.

In the District Court of Deaf Smith County, Texas.

No. 232.

GEO. W. LITTLEFIELD
vs.
THE EASTERN RAILWAY COMPANY OF NEW MEXICO et al.

Now come the defendants, The Southern Kansas Railway Company of Texas and The Atchison, Topeka & Santa Fe Railway Company, and (without in any manner waiving their plea of privilege filed herein, but answering under the judgment and order of the court requiring them so to do), each for itself, answers herein as follows, to-wit:

31 Each of these defendants adopts as its own, respectively, the several demurrers and pleas, in the order as therein presented, set up and contained in the answer of their co-defendant, The Pecos & Northern Texas Railway Company; and they each pray in their several behalfs as though fully written and contained herein, and in manner, form and language as by their said co-defendant.

TERRY, CAVIN & MILLS AND
MADDEN, TRULOVE & KIMBROUGH AND
CARL GILLILAND,
Attorneys for said Defendants.

Filed November 1, 1909. W. M. Cogdell, Clerk, District Court, Deaf Smith County.

Plaintiffs' First Supplemental Petition.

Filed May 31st, 1909.

In the District Court of Deaf Smith County, Texas.

GEO. W. LITTLEFIELD et al.
vs.
EASTERN RAILWAY COMPANY OF NEW MEXICO et al.

To said Honorable Court:

Come now the plaintiffs in the above entitled cause and leave of the court being first had, filed this, their first supplemental petition, by way of reply to the defendants' answer herein filed, and they plead and show to the Court as follows, to-wit:

First.

They deny all and singular the allegations in said answer, and of this they pray judgment of the Court:

Second.

If it be true, as alleged in said answer, that the immigration into the territory of New Mexico and Western Texas adjacent to
32 the lines of defendants was, during the months of September and October, 1907, so great as to over-tax the facilities of the defendants for moving and taking care of the traffic, incident to such immigration, and incident to the settlement of the country, and if it be true that the defendants, by reason of the increase in the population of said territory and country could not secure sufficient motive power and cars to promptly move and handle the freight tendered to them for shipment, then these plaintiffs say that such facts constitute no defense to this action, for such conditions were brought about, induced and aided by defendants, acting in conjunction with numerous land agents and agencies, and in conjunction with other railroad systems, all of whom were acting together in advertising said territory and country for settlement and inducing immigration to move into said country and territory, thereby greatly increasing the traffic therein and rendering it necessary to provide more cars and motive power to move the freight tendered to it for shipment because of such conditions. These plaintiffs further say that knowing the existence of such conditions for which defendants themselves were largely responsible, and of which they were one of the procuring causes, yet with such knowledge, said defendants negligently and carelessly failed and refused to provide the necessary motive power, cars and equipment necessary to enable them to discharge their duties to the public, and wherewith to promptly move the freight tendered to them for shipment. Wherefore, these plaintiffs say that if such conditions existed, all of which plaintiffs deny, same constitutes no defense to this action, and that defendants should

not be permitted to take advantage of their own carelessness and negligence in failing to provide such motive power and equipment as were rendered necessary to meet and provide for the conditions so existing, and of all these facts plaintiffs pray judgment of the Court.

33 & 34

W. A. DUNN,
J. A. TEMPLETON,
Attorneys for Plaintiffs.

Filed May 31, 1909. W. M. Cogdell, District Clerk, by A. B. Pirkey, Deputy.

* * * * * * *

35–38 *Order Overruling Defendants' Exception to Jurisdiction and General Special Demurrers.*

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
E. RY. CO. OF NEW MEXICO et al.

On Monday the 1st day of November, 1909, came on regularly to be heard, in order, the special exception of defendants to the jurisdiction of the court, and the general and special demurrers of defendants to plaintiffs' petition as said demurrers are set up in defendants' several answers. Said demurrers, general and special, and to the jurisdiction of the court, were then and there duly heard and considered by the court; and after hearing the argument of counsel, on both sides, it is ordered, adjudged and decreed by the court that said exceptions and demurrers, general and special, be and the same are in all things overruled. To which action and judgments of the court, the defendants then and there, each duly excepted.

Entered, Book 2, Dist. Min. Page 165.

* * * * * * *

39 *Defendants' Bill of Exceptions No. 2.*

Filed Jan. 10, 1910.

In the District Court of Deaf Smith County, Texas.

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
THE EASTERN RAILWAY COMPANY OF NEW MEXICO et al.

Be it remembered that upon the convening of Court on Monday, November 1, 1909, when the above entitled and numbered cause was first called for trial, and prior to the time of announcing of ready

for trial on its merits, the defendants, each and all appeared by their counsel, after the court had postponed the plea of privilege upon the part of the defendants and presented before the court their exceptions to the jurisdiction of this court as set up in the original answer of The Pecos & Northern Texas Railway Company herein, and in connection therewith presented to the Court, their oral motion and request to dismiss this cause for want of jurisdiction in this court, alleging and showing to the Court their reasons therefor; that the State Court was without jurisdiction and that the U. S. Court had exclusive jurisdiction over the matters in controversy herein, as set up in said special exceptions.

The Court then and there proceeded to hear such special exceptions and such oral motion and the argument of the counsel, and after having heard the same, over-ruled said motion and said exceptions, holding that the Court of Deaf Smith County had jurisdiction over the matters in controversy as well as the persons of the defendants herein, and proceeded to call and consider the matters in controversy herein, to which rulings and judgments and orders
40–148 of the Court, the defendants, each and all of them, in open Court duly excepted and now make and prepare this, their bill of exceptions No. 2, to such actions, orders and judgments of the Court, and ask that the same be examined, approved and ordered filed as a part of the record herein.

TERRY, CAVIN & MILLS,
MADDEN, TRULOVE & KIMBROUGH AND
CARL GILLILAND,
Attorneys for Defendants.

Examined, approved and ordered filed.

By D. B. HILL, *Dist. Judge.*

Filed Jan. 10, 1910. W. M. Cogdell, Dist. Clerk, by O. B. Perky, Dept.

* * * * * * *

149 *Charge of Court.*

In the District Court of Deaf Smith County, Texas, November Term, A. D. 1909.

GEO. W. LITTLEFIELD et al.
vs.
EASTERN RY. CO. OF N. M. et al.

Gentlemen of the Jury:

The Court instructs you as to the rules of law applicable to this case as follows, viz:

1. The burden of the proof in this case rests upon the plaintiffs, and before they can recover, plaintiffs must establish by a preponderance of the evidence all the facts necessary to their recovery.

2. Ordinary care, as that term is used in these instructions, mean such care as a person of ordinary prudence would commonly exercise under like circumstances, and the failure to exercise such care and prudence is negligence, as that term is used in this charge.

3. You are instructed that it is the duty of a railway company when engaged in the transportaion of freight over its lines of railway to provide and furnish for the use of shippers who desire to have their property transported over such lines of railway, suitable cars wherein to transport such property and to furnish same within a reasonable time after receiving from such shippers notice of the number and kind of cars desired and which are necessary for the transportation of such property; and the failure to exercise ordinary care to furnish such cars within a reasonable time after the receipt of such notice constitutes negligence.

4. If you believe and find from the evidence that on or about the 9th day of May, 1907, the plaintiffs gave to the defendants through W. S. Merrill, the station agent of defendants at Bovina, Texas, notice of the number and kind of cars which they de-
150 sired to use in the shipment of their cattle and for the time and place when and where such cars were desired for such use, and if you further find and believe from the evidence that the defendants received and accepted such notice and that the notice so given was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars at the time and place specified in such notice, unless you should find from the evidence that such request was thereafter withdrawn or abandoned by the plaintiffs. And you are further instructed in this connection, that if you should find and believe from the evidence that the plaintiffs, after placing with defendants their orders for one hundred cars to be furnished at Bovina, Texas, requested the defendants to transfer such cars from Bovina, Texas, to Kenna, New Mexico, and to furnish same at said last named station, and that plaintiffs in making such request of defendants, gave to them a reasonable notice of the time when such cars were desired for use at Kenna, and if you further find and believe from the evidence that the notice as given was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars for plaintiffs' use at such station of Kenna within a reasonable time after receiving from plaintiffs notice so to do, and a failure on the part of defendants to exercise such care to furnish such cars as were reasonably necessary for the movement of plaintiffs' cattle (not exceeding, however, the number specified in such notice) would constitute negligence.

5. If you should find and believe from the evidence that the plaintiffs about the last of August or first of September, 1907, notified defendants through their operator at Kenna, New Mexico, that they desired a sufficient number of cars to be furnished at said station for the use of plaintiffs in the shipment of their said cattle from said station to Kansas City or St. Joe, Missouri, and the plaintiffs
151 in giving such notice and in making such request notified defendants of the number of cars so desired and that they

desired same to be furnished at said station on the 15th day of September, 1907, or as soon thereafter as the cars could be furnished, and if you further find and believe from the evidence that the notice so given and the request so made was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars as were reasonably necessary for the movement of plaintiffs' cattle within a reasonable time after receiving such notice and a failure to exercise ordinary care to furnish such cars would constitute negligence on the part of the defendants.

6. If you find and believe from the evidence that the plaintiffs about the 9th day of September, 1907, or soon thereafter, relying on the duty imposed upon defendants to furnish the cars which they had requested defendants to furnish for the movement of their cattle (if you find that such request had been made) brought to said station of Kenna about thirty nine hundred head of cattle which they desired to ship to Kansas City and St. Joe, Missouri, as alleged in plaintiffs' petition, and if you further find and believe from the evidence that said cattle were tendered to defendants at said station for shipment over defendants' lines of railway from such station to Kansas City and St. Joe, Mo., and if you further find and believe from the evidence that the defendants negligently failed or refused to furnish for plaintiffs' use within a reasonable time after such cattle were so tendered to them for shipment a sufficient number of cars wherein to transport such cattle to their destination, and if you further find and believe from the evidence that said defendants in so failing and refusing to furnish such cars, were guilty of negligence, as
152 that term is defined in this charge, and if you further find and believe from the evidence that as a result of such negligence, the plaintiffs were deprived of the opportunity to transport their said — to Kansas City and St. Joe, Missouri, and that but for such negligence they would have shipped a number of their said cattle to Kansas City and the remainder thereof to St. Joe, Missouri, where said cattle would have been sold on the markets existing at said places, and if you further find and believe from the evidence that as a result of such negligence on the part of defendants (if you find there was such negligence) plaintiffs have suffered injury or damage from their inability to so ship and sell said cattle, then you are instructed that plaintiffs are entitled to recover of and from said defendants, such injury and damage as you may find from the evidence was the direct and proximate result of the defendants' negligence (if any) for failing to furnish cars for the movement of such cattle to said markets.

7. If under the foregoing instructions you should fail to find from a preponderance of the evidence that defendants were guilty of negligence in failing to furnish cars wherein to ship plaintiffs' cattle and in failing to accept and transport said cattle to the markets at Kansas City and St. Joe as requested by plaintiffs, or if you should fail to find from the evidence that the plaintiffs suffered any injury or damage as a result of the defendants' negligence, if you find there

was such negligence, then in either of such events, you will find for defendants.

8. If you should fail to find from the evidence that the notice and request given to defendants by plaintiffs to furnish a sufficient number of cars wherein to ship plaintiffs' cattle was a reasonable one, or if you should fail to find that defendants were guilty of negligence in failing to comply with such requests, then you are instructed to find for defendants.

153 9. If you believe and find from the evidence that at the time or times when plaintiffs notified defendants to furnish a sufficient number of cars wherein to move their said cattle, there was an unusual or unprecedented rush of business and demand for cars and motive power on defendants' lines of railway and that such unusual and unprecedented rush and demand continued during the months of September and October, 1907, while said plaintiffs' cattle were being held for shipment at said station at Kenna, and if you further find and believe from the evidence that the defendants under the circumstances then existing could not by the exercise of ordinary care have foreseen and provided against such unusual rush and unprecedented demand for cars and motive power and that they could not by the exercise of ordinary care procure sufficient motive power and cars to transport plaintiffs' cattle to market when same were tendered to defendants for shipment, or within a reasonable time thereafter, and that said defendants were not guilty of negligence in failing so to do, then you are instructed to find for the defendants. But you are further charged in this connection that it was the duty of defendants to exercise ordinary care to provide sufficient motive power, cars and facilities for the movement of traffic over their lines of railway, which by the exercise of such care might reasonably have been anticipated and provided for and a failure to exercise such care would constitute negligence, and if plaintiffs were injured by such negligence, they would be entitled to recover of defendants such damage as proximately resulted to them from said negligence.

10. If you believe and find from the evidence that the plaintiffs or their employes in charge of said cattle which were held at Kenna for shipment were guilty of negligence in bringing said cattle into said station at the time the same were brought there, or in

154 holding said cattle near said station while waiting for cars wherein to ship same, and if you further find and believe from the evidence that said cattle were injured or damaged as a result of such negligence, then you are instructed that plaintiffs can not recover such damage, if any, as you find resulted from their own negligence, or that of their employees. Any and all injuries or damages so sustained by said cattle through the fault and neglect of the plaintiffs, are not recoverable in this suit and should be excluded from your consideration in assessing the damage, if any, which plaintiffs are entitled to recover.

11. If under the foregoing instructions, you should find for the plaintiffs, then you are instructed that in assessing the damage you will ascertain and find from the evidence:

(*a*) The market value on the markets at Kansas City and St. Joe,

Missouri, of such of plaintiffs' said cattle as you find and believe from the evidence would have been shipped by plaintiffs to and sold on said markets, respectively, such values to be estimated on the dates on which said cattle would have been so sold on said markets;

(*b*) You will then deduct from such market values the usual and necessary expenses incident to the transportation and sale of such cattle on said markets;

(*c*) You will then find the market values of such cattle at Kenna, New Mexico, at the time when plaintiffs ascertained that they could not procure cars in which to ship the same to said markets, provided such cattle has a market value at such time and place, but if you find they had no such market value at that time and place, you will then find from the evidence the intrinsic value of such cattle at such time and place. In this connection you are charged that if you should find under paragraph 10 of this charge that plaintiffs' said cattle while being brought to Kenna or held there for shipment, were injured and damaged as a result of the negligence of plaintiffs or their employes in so bringing in and holding said cattle as they
155 did, then in estimating the value of said cattle at Kenna, you will estimate and find same in the condition said cattle would have been in at such time and place but for the negligence of plaintiffs and their employees.

(*d*) If you find from the evidence that the net market value of such cattle on said markets exceeds the value of such cattle at Kenna, estimated as above stated, then you will find the difference between such value at Kenna and the net market value of such cattle on the markets at Kansas City and St. Joe, Missouri.

(*e*) You will then find the expenses, if any, necessarily and properly incurred by plaintiffs in holding said cattle at Kenna while waiting for cars in which to ship them, if you find there was any such expense incurred;

(*f*) You will then add the amount of such expenses so found, if any, to the difference between the value of said cattle at Kenna and the net market value of said cattle at Kansas City and St. Joe, Missouri, as above ascertained, and you will return a verdict in favor of plaintiffs against the defendants for the amount so found, together with six per cent per annum interest thereon from the first day of November, 1907, to the present time.

12. If under the foregoing instructions you find for the defendants, you will simply so state in your verdict.

13. You are the sole judges of the credibility of the witnesses and the weight of the evidence, but the law you must receive from the Court and be governed thereby.

D. B. HILL,
Dist. Judge, 69th Judicial Dist. of Texas.

Filed the 4th day of November, A. D. 1909, at 5:38 o'clock P. M. W. M. Cogdell, Dist. Clerk, Deaf Smith County, Texas.

156 *Defendants' Motion for Special Issues and Charges.*

In the District Court of Deaf Smith County, Texas, November Term, A. D. '09.

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
E. RY. CO. OF N. M. et al.

Now come the defendants and move and request the Court to submit to the jury, as a basis for determining the venue herein and the jurisdiction of this Court and hereunder determining the matters in controversy herein, the following special issues, to-wit:

1. The jury are charged to consider and find from the evidence whether or not at the time plaintiffs sought to have their cattle shipped in September and October, 1907, the defendants were partners engaged in the operation of a through line of railway from Roswell, through Kenna, Bovina, Hereford, Amarillo, Higgins, and thence on to Kansas City as common carriers of freight for hire;

2. As to whether or not the said lines of railroad, that is, the line of road from Roswell, through Kenna, to Texico, and from Texico through Bovina and Hereford to Amarillo, and from Amarillo through Higgins to the Texas-Oklahoma State Line, and from thence to Kansas City and St. Joe form and constitute but a single through line of railway which was at the time in question, September and October, 1907, owned and operated by the Atchison, Topeka and Santa Fe Railway Company, the other defendants herein being but auxiliary corporations organized by said Atchison Company to enable it to carry on its business in Texas and New Mexico.

To enable the jury to pass upon these questions, the defendants request the court to give the following legal definitions, to-wit:

157 (*a*) A partnership is where two or more persons (a corporation being an artificial person) engaged in a common enterprise, each and all contributing some part of the capital, labor or skill necessary or required to carry on such enterprise, and where there is some agreement or understanding between them to share in the profits of such common undertaking; and where there is no such common undertaking or agreement for a division of the profits between two or more railway companies engaged as common carriers, and where their lines of road connect with each other, the fact that they may or do enter into an agreement for a division of through freights or charges fixed for the transportation of freights over their respective lines of road, by them respectively, on some common basis or rate of division agreed upon, will not alone constitute such railway companies partners; nor will the fact that one of the companies owns a majority or any other portion of the capital stock certificates of the other, and through such ownership effects the election of its officers and controls or influences the management of its business, constitute such companies partners;

(*b*) The fact that one railway corporation may own a majority of the certificates of capital stock issued by another and the bonds issued by it or either, and as owner of such majority of the capital stock elects the officers of the company, the stock of which it owns, and, through such means and without owning directly its physical property or directly operating its line of road, controls and influences the management of the business of such other company, will not alone constitute and make the two railroad companies one and the same company, nor be alone sufficient to create a joint liability or make each liable for the acts of the other.

3. The jury are directed to number their findings and make answers to the above and foregoing questions No. 1 and 2, numbering the answers to correspond with the numbers of ques-
158 tions, respectively.

MADDEN, TRULOVE & KIMBROUGH AND
CARL GILLILAND,
Attorneys for Defendants.

Special Charge No. 1 Requested by Defendants.

In the District Court of Deaf Smith County, Texas, November Term, A. D. 1909.

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
E. RY. CO. OF N. M. et al.

The defendants Atchison, Topeka & Santa Fe Railway Company, The Southern Kansas Railway Company of Texas, and Eastern Railway Company of New Mexico, each request the Court to charge the jury as follows:

Plaintiffs sue defendants alleging a joint liability, charging, in substance, to show a joint liability; that defendants are partners, and as such engaged in the operation of their lines of railroad as one and the same line of road, carrying freights and passengers for hire; and that the Atchison, Topeka & Santa Fe Railway Company owns and operates all of the several lines of roads in question, the other defendants being merely auxiliary organizations and incorporated under the laws of the several respective states and territories where incorporated as a means by which said Atchison Company is enabled to carry on its business as a common carrier in Texas and New Mexico. The defendants Atchison, Topeka & Santa Fe Railway Company, The Southern Kansas Railway Company of Texas, and Eastern Railway Company of New Mexico plead to the venue under oath, claiming their respective right to be sued in Potter and El Paso Counties, Texas, respectively.

If the jury find and believe from the evidence that the defendants were not partners and as such engaged in transporting live stock,

freights and passengers for hire at the time plaintiffs sought
159 and failed (if they did seek and fail) to have their cattle transported, and that, at said time, the Atchison, Topeka & Santa Fe Railway Company did not own and operate all of the lines of road referred to and situated in New Mexico and Texas, and that the other defendants were merely its auxiliary creations and by it incorporated as a means by which it is enabled to carry on such business in Texas and New Mexico, then you will return a verdict in favor of said defendants on their plea of venue and so say by your verdict.

In this connection you are further charged as follows:

(*a*) A partnership is where two or more persons (a corporation being an artificial person) engaged in a common enterprise, each and all contributing some part of the capital, labor or skill necessary required to carry on such enterprise, and where there is some agreement or understanding between them to share in the profit of such common undertaking; and when there is no such common undertaking or agreement for a division of profits between railway companies engaged as common carriers, and whose lines of road connect with each other, the fact that they may or do enter into an agreement for a division of through freight, or charges fixed for the transportation of freights over their respective lines of road by them respectively, on some given basis or rate of division agreed upon, will not alone constitute such companies partners; nor will the fact that one company owns a majority, or any portion of the capital stock certificates of the other, and through such ownership effects an election of its officers, constitute such companies partners. (*b*) The facts that one railway corporation may own a majority of the certificates of capital stock issued by another, and the bonds issued by it, or either, and as the owner of such majority of stock elects the officers of the company the stock of which it owns, and through such means, and without the direct ownership of its physical prop-
160 erty or direct operation, controls and influence- the management of the business of such company, will not make one liable for the acts of the other, nor be alone sufficient to create a joint liability.

MADDEN, TRULOVE & KIMBROUGH AND
CARL GILLILAND,
Attorneys for Defendants.

Refused.
D. B. HILL, *Dis't Judge.*

Filed Nov. 4th, A. *A.* 1909. W. M. Cogdell, Dis't Clerk, Deaf Smith County, Texas.

The above motion was prepared after the conclusion of the argument. During the time of the argument while plaintiffs' counsel was addressing the jury and when closing same, defendants' counsel spoke to the court and told him that he wanted to present such motion, that the same had been dictated and when written, he wanted to present the same before the reading of the court's charge. The court then told defendants' counsel that he would overrule the mo-

ion and go ahead and present it. After the court began to read his harge, the stenographer brought the motion into the court when it vas placed on the judge's stand; after the court had completed the eading of his main charge to the jury, his attention was called to his motion as the one defendants' counsel had previously spoken to im about. The court then overruled said motion and refused so to harge the jury.

D. B. HILL,
Dist. Judge 69th Judicial Dist. of Texas.

Filed November 4, 1909. W. M. Cogdell, District Clerk.

Special Charge No. 2 Requested by Defendants.

No. 232.

61 In the District Court of Deaf Smith County, Texas, November Term, A. D. 1909.

GEO. W. LITTLEFIELD et al.
vs.
EASTERN RY. CO. OF N. M. et al.

The defendants request the following special charge: Unless the ry find and believe from the evidence, that the several lines of ilroad owned by the several defendants, extending from and rough Roswell in New Mexico through to Texico, and thence to d through Bovina and Hereford to Amarillo, and thence to and rough Higgins to the Texas and Oklahoma state line, and from ence to Kansas City and the city of St. Joseph, in the State of issouri, at the times of said orders for cars were made and said ttle desired to be shipped, constituted a single through line of rail- ay between all of the said points above named and was then being erated jointly by defendants as partners, or that defendant the tchison, Topeka & Santa Fe Railway Company owned said lines road and that the other defendants, and each and all of them re mere auxiliary and subordinate corporations organized and in- rporated by or under the supervision of said Atchison Company a means by which it would be enabled to carry on its business as common carrier in New Mexico and Texas, you will find for the fendants and so say by your verdict. And in this connection u are further charged as follows: (*a*) A partnership is where two more persons (a corporation being an artificial person) engaged a common enterprise, each and all contributing some part of the pital, labor or skill necessary or required to carry on such enter- se, and where there is some agreement or understanding between em to share in the profits of such common undertaking; and ere there is no such common undertaking or agreement for a vision of profits between two or more railway companies engaged common carriers, and where their lines of road connect with each er, the fact that they may or do enter into an agreement for a

division of through freights or charges fixed for the trans-
162–167 portation of freights over their respective lines of road, by them respectively, on some common basis or rate of division agreed upon, will not alone constitute such railway companies partners; nor will the fact that one of the companies owns a majority, or any other portion of the capital stock certificates of the other and through such ownership effects an election of its officers, constitute such companies partners. (*b*) The fact that one railway corporation may own a majority of the certificates of capital stock issued by another, and the bonds issued by it, or either, and, as the owner of such majority of the stock, elects the officers of the company the stock of which it owns, and, through such means and without owning directly its physical property or directly operating its lines of road, controls and influences the management of the business of such other company, will not alone constitute and make such two or more railway companies one and the same company, nor be alone sufficient to create a joint liability making each liable for the acts of the other.

MADDEN, TRULOVE & KIMBROUGH, AND CARL GILLILAND,
Attorneys for Defendants.

Requested in open court after the court's charge is read and before the jury retires, when same is refused.

D. B. HILL,
Dist. Judge, 69 Judicial Dist. of Texas.

Filed November 4, 1909. W. M. Cogdell, Clerk District Court.

* * * * * * *

168 *Judgment of Court.*

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
E. RY. CO. OF NEW MEXICO et al.

MONDAY, November 1st, A. D. 1909.

169 On Monday, November 1st, 1909, immediately after the court had passed on and disposed of the questions of law herein, this cause was called for trial on the merits, when the parties appeared and announced ready for trial. Thereupon there came and was duly selected, empannelled and sworn to try this cause, a jury of good and lawful men, to-wit, Geo. H. Guinn, and eleven others. Thereupon, on the convening of the court on the morning of Tuesday, November 2d, 1909, and before proceeding with the trial and the submission of the evidence, plaintiff- asked leave to amend or change their petition by changing a date therein from the 15th to the 9th of September and eliminating the sentence charging that the second herd of cattle were driven to Kenna about

October 12, 1907. Thereupon defendants objected to the change or amendment being allowed, but agreed to waive and did waive a rewriting and filing of a new pleading if the court allowed the amendment, or change, taking no exception to the manner of the amendment by erasure; whereupon the court permitted such amendment and change of said petition upon condition and with the understanding that defendants' exceptions and demurrers, general and special, presented and overruled on November 1, 1909, together with the judgment and order of the court overruling the same, and defendants' exceptions thereto, apply and be considered as having been made with reference to and as applying to the petition as so amended. And the said demurrers were so invoked and overruled as to such amended or changed petition, and such exceptions to the court overruling such demurrers, were so made and entered of record.

Thereafter the trial of this cause proceeded; and said jury, after having heard the evidence, the argument of counsel, and the charge of the court, on the 5th day of November, 1909, duly returned into open court their verdict as follows, to-wit:

170 "We, the jury, find for the plaintiff in the sum of $9,828.00 with interest at 6% per annum from November 1st, 1907, to date, November 5th, 1909, viz., $1,187.55, total: $11,015.55.

GEO. H. GUINN, *Foreman.*"

Therefore, it is ordered, adjudged and decreed by the court, that the plaintiffs, Geo. W. Littlefield, J. P. White, and T. D. White, composing the Littlefield Cattle Company, do have and recover of and from defendants the Eastern Railway Company of New Mexico (a corporation), the Pecos & Northern Texas Railway Company (a corporation), the Southern Kansas Railway Company of Texas (a corporation), and the Atchison, Topeka & Santa Fe Railway Company (a corporation), jointly and severally, said sum of Eleven Thousand fifteen dollars and fifty-five cents ($11,015.55) together with interest thereon from the 5th day of November, 1909, until paid, and all costs of suit; and that execution issue accordingly.

O. K.

D. B. HILL.

Entered Book 2, Page 1656.

Defendants' Amended Motion for New Trial.

In the District Court of Deaf Smith County, Texas.

No. 232.

GEO. W. LITTLEFIELD et al.

vs.

THE EASTERN RAILWAY COMPANY OF NEW MEXICO et al.

Now come the defendants in the above entitled and numbered cause, and, by leave of the court, amend their original motion for

new trial filed herein on the 5th day of November, 1909, so as to move the court to set aside the verdict of the jury and the judgment rendered thereon against them, in this cause, on the 5th
171-173 day of November, 1909, for the following reasons, to-wit:

* * * * * * *

2. The court erred in overruling defendants' exceptions to the jurisdiction of the court and refusing to dismiss this cause for the want of jurisdiction over the subject matter in controversy, and also further erred in refusing to submit the issues of fact bearing on the question of jurisdiction to the jury.

* * * * * * *

174 37. Said verdict of the jury and the judgment entered thereon are contrary to and unsupported by the law and the facts, in this:

* * * * * * *

(*b*) The facts show that the court is without jurisdiction over the subject matter in controversy herein, in that it shows that the four defendants are four distinct corporations, owning four distinct lines of road, each located in separate states and territories, and that they were not partners.

(*c*) There is no sufficient evidence or partnership as is alleged, and the facts show there was no such partnership.

(*d*) There is no sufficient evidence of agency as is alleged.

(*e*) There is no sufficient evidence of facts as alleged to the effect that defendants are one in point of fact and that the other defendants are but the auxiliary creatures and agencies used by the Atchison, Topeak & Santa Fe Railway Company as a means of carrying on its business in Texas and New Mexico.

* * * * * * *

175 Wherefore, Defendants pray the judgment of the court, setting aside said verdict and judgment and granting it a new trial herein, for costs, etc.

MADDEN, TRULOVE & KIMBROUGH AND CARL GILLILAND,

Attorneys for Defendants.

Filed Nov. 22, 1909. W. M. Cogdell, Clerk Dist. Court, Deaf Smith Co., Texas.

Form of Judgment Overruling Motion for New Trial.

No. 232.

176 GEO. W. LITTLEFIELD et al.

VS.

E. RY. CO. OF NEW MEXICO et al.

On this the 29th day of November, 1909, came on regularly to be heard and considered the defendants' motion for a new trial filed

herein on the 5th day of November, 1909, as amended by amendment filed on the 16th day of November, 1909. Thereupon came the parties by their respective attorneys and regularly submitted said motion to the court. The court, having fully heard and considered said motion, is of opinion that the law is against the same. It is, therefore, ordered and adjudged by the court, that the defendants' said motion, as amended, be and the same is, in all things overruled. To which action and judgment of the court, the defendants, each and all, in open court, then and there duly excepted and gave notice of appeal to the court of Civil Appeals within and for the Second Supreme Judicial District of Texas.

It is further ordered by the court, by this order written on the minutes thereof, on motion of defendants' counsel, that the official stenographer of this court be and he is hereby required to transcribe the testimony and other proceedings recorded by him in this cause, making such transcript in duplicate and certifying thereto as is required by law, and file the original thereof with the Clerk of this court and deliver a duplicate to defendants' counsel within ten days from this date, the time limit hereinabove named subject to change by order of the court.

It is further ordered that the parties be and they are hereby allowed thirty days from this date within which to make up, prepare and file a statement of facts and bills of exception herein, which time may be extended for cause shown to the court hereafter.

O. K.

D. B. HILL.

Entered Book 2, Page 176, Dist. Court Minutes.

177 *Appeal Bond.*

Filed December 14, 1909.

In District Court of Deaf Smith County, Texas.

No. 232.

GEO. W. LITTLEFIELD et al.
vs.
EASTERN RY. CO. OF N. M. et al.

Whereas, in the above entitled and numbered cause, pending in the District Court of Deaf Smith County, Texas, at a regular term of said court, to-wit, on the 5th day of November, 1909, the said Geo. W. Littlefield, J. P. White and Thomas D. White, plaintiffs, recovered judgment against the said Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and the Atchison, Topeka & Santa Fe Railway Company, defendants, for the sum of $11,015.55, with interest thereon from the 5th day of November, 1909, at six percent per annum, and all costs of suit; and,

Whereas, on the 29th day of November, 1909, a motion theretofore on the 5th day of November, 1909, filed by said defendants (and amended on the 22d day of November, 1909) praying for a new trial was overruled, to which action of the court the said defendants and each of them then and there excepted and gave notice of appeal to the Court of Civil Appeals of the Second Supreme Judicial District, and,

Whereas, said defendants have taken an appeal to the court of Civil Appeals for the Second Supreme Judicial District of Texas, and desire to suspend the execution of said judgment pending such appeal:

Now, therefore, we, the Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and the Atchison, Topeka & Santa Fe Railway Company, as principals, and —— ——, and —— ——, as sureties, hereby acknowledged ourselves bound
178 to pay to said Geo. W. Littlefield, J. P. White and Thomas D. White, the sum of Twenty-four Thousand Dollars:

Conditioned, that the said above named principals, as appellants, shall prosecute their appeal with effect, and, in case the judgment of the Supreme Court or the Court of Civil Appeals, shall be against them, they shall perform its judgment, sentence or decree, and pay all such damages as said court may award against them.

Witness the signatures of said parties, signed this December 11, 1909.

EASTERN RAILWAY COMPANY OF NEW MEXICO,
THE PECOS & NORTHERN TEXAS RY. CO.,
THE SOUTHERN KANSAS RY. CO. OF TEXAS,
ATCHISON, TOPEKA & SANTA FE RY. CO.,
By Their Attorneys of Record,
MADDEN, TRULOVE & KIMBROUGH.

CHAS. A. FISK, *Surety.*
RAY WHEATLEY, *Surety.*
J. N. FREEMAN, *Surety.*

I have fixed the probably amount of costs in the court below and the appellate courts at $250.00, and I hereby approve and file the above and foregoing bond.

This, December 14, 1909.

W. M. COGDELL,
Clerk of the District Court of Deaf Smith County, Texas.

Filed December 14, 1909. W. M. Cogdell, Clerk of Dist. Court, Deaf Smith Co., Texas.

* * * * * * *

179 *Assignment of Errors.*

In the District Court of Deaf Smith County, Texas.

No. 232.

180 GEO. W. LITTLEFIELD et al.
vs.
E. RY. CO. OF NEW MEXICO et al.

Now come the defendants, the Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and the Atchison, Topeka & Santa Fe Railway Company, and, appealing from the judgment rendered against them in the above entitled and numbered cause in said court, each shows to the appellate court, that the trial court erred upon the trial and in the disposition therein of said cause, to the prejudice of each and all of said defendants, as follows, to-wit:

1. The trial court erred in refusing to consider the plea of privilege filed by defendants, the Atchison, Topeka & Santa Fe Railway Company, The Southern Kansas Railway Company of Texas, and the Eastern Railway Company of New Mexico, and ordering the same to be passed and considered by the jury along with the other issues raised by the pleadings and facts, as is complained of in defendants' bill of exceptions, No. 1.

2. The trial court erred in overruling defendants' special demurrer to the jurisdiction of the court over the subject matter in controversy, as presented in No. 1 of defendants' original answer, and as well erred in overruling their oral motion to dismiss for want of jurisdiction, therewith presented, as is complained of in defendants' bill of exceptions No. 2.

3. The trial court erred in overruling defendants' special demurrer No. 1 to plaintiffs' petition, which is as follows:

"All those parts of said petition which allege the relationship of defendants to each other and their relative interests in the alleged lines of road from Kenna, New Mexico, to Kansas
181 City and St. Joseph, Mo., except in so far as a partnership is alleged, is insufficient in law to show any liability of this defendant for the acts of the other defendants, or either of them, or the liability of any or either of the other defendants for the acts of this defendant; and it appears therefrom that the acts of only the Eastern Railway Company of New Mexico are complained of."

4. The trial court erred in overruling defendants' special demurrer No. 2, to plaintiffs' petition, which is as follows:

"All those parts thereof which seek to allege that the defendant The Atchison, Topeka & Santa Fe Railway Company is the owner of the other defendants and the dominant Company, controlling the other defendant companies, is insufficient to show any liability of this defendant for the acts of the Atchison, Topeka & Santa Fe

Railway Company or liability of that company for the acts of this defendant; in that it is not shown wherein nor how the Atchison, Topeka & Santa Fe Ry. Co. controls this defendant, nor that it has any controlling influence or interest in this defendant company, other than would be incident to its ownership of stock certificates of this company and its acts as a stock holder, which would not make this defendant liable for the acts of the Atchison, Topeka & Santa Fe Rv. Co., nor would it make The Atchison, Topeka & Santa Fe Ry. Co., as a Company, liable for the acts of this defendant."

5. The trial court erred in overruling defendants' special demurrer No. 3, to plaintiffs' petition, which is as follows:

"Those parts of said petition which allege that the Atchison, Topeka & Santa Fe Ry. Co. is the owner of the other defendant Companies and controls them, is inconsistent and contradictory with the allegation that the defendants are each and all partners and as partners agents each for the other."

182–191 6. The trial court erred in overruling defendants' special demurrer No. 4, to plaintiffs' petition, which is as follows:

"Those parts of said petition which allege that defendants are agents for each other, are insufficient, in that it is not shown of what the agency consists, nor wherein, or how, each sustains the relationship of agent to the other, and vice versa."

* * * * * * *

192 34. The trial court erred in refusing to give in charge to the jury, special charge No. 1, requested by defendants, which is as follows: "Plaintiffs sue defendants alleging a joint liability, charging in substance, to show a joint liability, that defendants are partners, and as such engaged in the operation of their lines of railroad as one and the same line of road, carrying freights and passengers for hire; and that the Atchison, Topeka & Santa Fe Railway Company, owns and operates all of the several lines of roads in question, the other defendants being merely auxiliary organizations and incorporated under the laws of the several respective states and territories where incorporated as a means by which said Atchison Company is enabled to carry on its business as a common carrier in Texas and New Mexico. The defendants, Atchison, Topeka & Santa Fe Railway Company, The Southern Kansas Railway Company of Texas, and Eastern Railway Company of New Mexico, plead to the venue under oath, claiming their respective right to be sued in Potter and El Paso counties, Texas, respectively.

193 If the jury find and believe from the evidence that the defendants were not partners and as such engaged in transporting live stock, freights and passengers for hire at the time plaintiffs sought and failed (if they did seek and fail) to have their cattle transported, and that, at said time, the Atchison, Topeka & Santa Fe Railway Company did not own and operate all of the lines of road referred to and situated in New Mexico and Texas, and that the other defendants were merely its auxiliary creations and by it incorporated as a means by which it is enabled to carry on such

business in Texas and New Mexico, then you will return a verdict in favor of said defendants on their plea of venue and so say by your verdict.

In this connection you are further charged as follows: (*a*) A partnership is where two or more persons (a corporation being an artificial person) engaged in a common enterprise, each and all contributing some part of the capital, labor or skill necessary or required to carry on such enterprise, and where there is some agreement or understanding between them to share in the profit of such common undertaking; and when there is no such common undertaking or agreement for a division of profits between railway companies engaged as common carriers, and whose lines of road connect with each other, the fact that they may or do enter into an agreement for a division of through freight, or charges fixed for the transportation of freights over their respective lines of road by them respectively, on some given basis or rate of division agreed upon, will not alone constitute such companies partners; nor will the fact that one company owns a majority, or any portion of the capital stock certificates of the other, and through such ownership effects an election of its officers, constitute such companies partners. (*b*) The fact that one railway corporation may own a majority of the certificates of capital stock issued by another, and the bonds issued by it, or either, and as the owner of such majority of stock elects the
194 officers of the company the stock of which it owns, and through such means, and without the direct ownership of its physical property or direct operation, controls and influences the management of the business of such company, will not make one liable for the acts of the other, nor be alone sufficient to create a joint liability."

35. The trial court erred in refusing to give in charge to the jury, Special Charge No. 2, requested by defendants, which is as follows: "Unless the jury find and believe from the evidence, that the several lines of railroad owned by the several defendants, extending from and through Roswell in New Mexico, through to Texico, and thence to and through Bovina and Hereford to Amarillo, and thence to and through Higgins to the Texas and Oklahoma state line, and from thence to Kansas City and the City of St. Joseph, in the State of Missouri, at the times of said orders for cars were made and said cattle desired to be shipped, constituted a single through line of railway between all of the said points above named and was then being operated jointly by defendants as partners, or that defendant, the Atchison, Topeka & Santa Fe Railway Company owned said lines of road, and that the other defendants, and each and all of them were mere auxiliary and subordinate corporations organized and incorporated by or under the supervision of said Atchison Company, as a means by which it would be enabled to carry on its business as a common carrier in New Mexico and Texas, you will find for the defendants and so say by your verdict. And in this connection you are further charged as follows: (*a*) A partnership is where two or more persons (a corporation being an artificial person) engaged in a common enterprise, each and all

195–199 contributing some part of the capital, labor or skill necessary or required to carry on such enterprise, and where there is some agreement or understanding between them to share in the profits of such common undertaking; and where there is no such common undertaking or agreement for a division of profits between two or more railway companies engaged as common carriers, and where their lines of road connect with each other, the fact that they may or do enter into an agreement for a division of through freights or charges fixed for the transportation of freights over their respective lines of road, by them respectively, on some common basis or rate of division agreed upon, will not alone constitute such railway companies partners; nor will the fact that one of the companies owns a majority, or any other portion of the capital stock certificates of the other and through such ownership effected an election of its officers, constiture such companies partners. (*b*) The fact that one railway corporation may own a majority of the certificates of capital stock issued by another, and the bonds issued by it, or either, and as the owner of such majority of the stock elects the officers of the company the stock of which it owns, and through such means and without owning directly its physical property or directly operating its lines of road, controls and influences the management of the business of such other company, will not alone constitute and make such two or more railway companies one and the same company, nor be alone sufficient to create a joint liability making each liable for the acts of the other."

* * * * * * *

200 & 201 Wherefore, defendants appeal from the said judgment of the trial court and pray the judgment and order of the appellate court reversing the same, and dismissing or remanding this cause, as the law may require, for costs, etc.

TERRY, CAVIN & MILLS,
Attorneys for the A., T. & S. F. Ry. Co.
MADDEN, TRULOVE & KIMBROUGH AND CARL GILLILAND,
Attorneys for Other Defendants.

Filed February 10, 1910. W. M. Cogdell, District Clerk, by O. B. Pirkey, Deputy.

202–366 THE STATE OF TEXAS,
County of Deaf Smith:

I, W. M. Cogdell, Clerk of the District Court of Deaf Smith County, Texas do hereby certify that the above and foregoing 197 pages of transcript contains a true and correct copy of all the records and proceedings had in the cause of G. W. Littlefield et al. vs. The Eastern Railway Company of New Mexico et al., numbered 232 on the docket of the District Court of Deaf Smith County, Texas, as the same now appears of record, and on file in my office, together with a true and correct copy of the bill of costs accrued thereon to this date.

Witness my official signature and the seal of said Court, at my office in the City of Hereford, Texas on this the 7th day of March A. D. 1910.

[Seal of District Court, Deaf Smith County, Texas.]

W. M. COGDELL,
Clerk of the District Court of Deaf Smith County, Texas,
By O. B. PIRKEY, *Deputy.*

Endorsed: No. 232. Geo. W. Littlefield et al. vs. The Eastern Ry. Co. of N. M. et al. Appealed from The District Court of Deaf Smith County, Texas, to the Court of Civil Appeals, Second Supreme Judicial District of Texas at Fort Worth, Texas. No. 2274. 2nd District. Filed in Supreme Court May 3rd, 1911, F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Affirmed March 19, 1913. Rehearing overruled May 21, 1913.

* * * * * * *

367 Proceedings in the Court of Civil Appeals for the Second Supreme Judicial District, at Fort Worth, Texas.

Opinion.

Filed January 28, 1911.

No. 6687.

EASTERN RAILWAY COMPANY OF NEW MEXICO et al., Appellants,
vs.
GEO. W. LITTLEFIELD et al., Appellees.

From the District Court of Deaf Smith County.

George W. Littlefield, J. P. White and Thos. D. White composing the firm of Littlefield Cattle Company, sued the Eastern Railway Company of New Mexico, the Pecos & Northern Texas Railway Company, the Southern Kansas Railway Company of Texas and the Atchison, Topeka & Santa Fe Railway Company in the District Court of Deaf Smith County to recover damages for a failure to furnish cars for a shipment of cattle from Kenna, New Mexico, to St. Joseph or Kansas City, Mo. There was the general issue and plea of contributory negligence in bringing the cattle to the pens after having been notified that cars might not be available and the final trial before a jury resulted in a verdict and judgment for plaintiffs in the sum of eleven thousand, fifteen dollars and fifty-five cents. The defendants all appeal.

Those assignments complaining of the court's action with reference to pleas of privilege interposed by some of the appellants are disposed of in our conclusion that the undisputed evidence is such as to show that all the appellants were partners and agents of each

other and had a common agent in Deaf Smith County in such manner as to make them all subject to the jurisdiction of the District Court of that county. S. K. Ry. Co. of Texas v. Crump, 74 S. W. R. 335.

368 There was some evidence indicating that one Wilkerson owned an undivided interest in a portion of the cattle driven by plaintiffs to Kenna for shipment in view of which appellants requested the following charge:

"If the jury find for the plaintiffs and also find and believe from the evidence that any of the cattle driven to or near Kenna were owned by Littlefield, the Whites and one Wilkerson at the time they were so driven and not by Geo. W. Littlefield, J. P. White and T. D. White alone, you will not consider in estimating the amount of damages to be awarded any such cattle as may have been then partly owned by Wilkerson, but consider only those owned exclusively by plaintiffs; and in this connection you are charged that the fact that Wilkerson may have owed for the purchase price of such cattle or his interest therein will not destroy his rights therein at that time and you will not consider such fact."

It may be that Wilkerson owned an interest in such cattle under such circumstances as that the plaintiffs could not recover for his interest, but it would hardly follow that they could not recover for their own interest and the charge is, therefore, a little too favorable to the defendants when by it the jury are told not to consider at all any cattle not owned exclusively by the plaintiffs. Waggoner v. Snody, 82 S. W. R. 355, 85 S. W. R. 1134.

The defendants further requested a charge on the issue of contributory negligence as follows:

"If the jury find from the evidence that the defendants were negligent and that because of such negligence plaintiffs are entitled to recover and the jury also further find from the evidence that after having been by Avery Turner notified of a car shortage and the defendants might not be able to furnish cars and plaintiffs

369 drove their cattle from the accustomed range and pasture to or near Kenna without having first been notified that cars were available for shipping, and if such driving and holding the cattle near Kenna was negligence as the term negligence is defined in the court's charge," etc.

There was no occasion for the giving of this charge since the court had covered the issue in a more apt way. The singling out of the circumstance of Avery Turner's notifying plaintiffs of a car shortage was an unnecessary emphasis of that feature of the testimony, and the third special charge to the effect that notice given to the local agent or telegraph operator at any other station than Kenna would not constitute notice to the defendants and the jury would, therefore, disregard such evidence, denied appellees the benefit of such testimony on the plea of contributory negligence and was properly refused.

We find no error in the court's rulings on evidence or in the charges given or refused. The evidence is sufficient to support the verdict and judgment and it is unnecessary to cumber this opinion

with a statement of its details. Perhaps, the sixteenth assignment should be noticed. It complains of the refusal of the following charge:

"If you find for the plaintiffs in considering the amount of damages to be awarded you will not allow for such expenses, if any, as may have been incurred in holding said cattle near Kenna or damages thereto sustained from the time the cattle were brought in until the time the cattle should have been shipped out."

There is some indication in the evidence that at least some of the cattle were brought into Kenna sooner than they should have been, but the charge requested was a little too broad and applied to all of the cattle in controversy when at least a portion of them
370 were indisputably tendered at a seasonable time. It was therefore properly refused.

We find no error in the judgment and it is affirmed.

OCIE SPEER,
Associate Justice.

Endorsed: No. 6687. With App. No. 7245. Eastern Railway Company of New Mexico, et al., Appellants, vs. Geo. W. Littlefield, et al., Appellees. Affirmed. Filed in the Court of Civil Appeals for Second Supreme Judicial District of Texas Jan. 28, 1911. J. A. Scott, Clerk. Opinion by Speer, Associate Justice. Filed in Supreme Court April 20, 1911. F. T. Connerly, Clerk.

Judgment.

Entered January 28, 1911.

From District Court Deaf Smith County, January 28, 1911.

6687.

EASTERN RAILWAY CO. OF NEW MEXICO et al.
vs.
GEO. W. LITTLEFIELD et al.

Opinion by Mr. Speer, A. J.

This cause came on to be heard on the transcript of the record, and the same being inspected because it is the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Geo. W. Littlefield, J. P. White and T. D. White, composing the Littlefield Cattle Company, do have and recover of and from the appellants, Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, the Southern Railway Company of Texas, and the Atchison, Topeka & Santa Fe Railway Company, and their sureties, Chas.

A. Fisk, Ray Wheatley and J. N. Freeman, the amounts
371–374 adjudged below, together with all costs in this behalf expended, and that this decision be certified below for observance.

* * * * * * *

375 *Amended Motion for Rehearing.*

Filed by Order of Court February 10, 1911.

376 In the Court of Civil Appeals, Second Supreme Judicial District of Texas.

No. 6687.

EASTERN RAILWAY COMPANY OF NEW MEXICO et al., Appellants,
vs.
GEORGE W. LITTLEFIELD et al., Appellees.

Come now the appellants in the above numbered and entitled cause and by leave of the court file the following amended motion for rehearing in lieu of their original motion for re-hearing filed herein on February 10, 1911, and move the court to set aside the judgment rendered herein on the 28th day of January, 1911, and the opinion filed herein on said date, and grant them a re-hearing and reverse the judgment of the trial court and remand the cause for a new trial, and they show to the court that such re-hearing should be granted and said cause reversed and remanded for reasons as follows, to-wit:

1. This court erred in overruling appellants' assignment "I" presented in their brief (their 1st assignment in the record), and the proposition thereunder submitted, as said assignment and proposition are presented on pages 2 to 5 in appellants' brief.

* * * * * * *

3. This court erred in overruling appellants' assignment "III" presented in their brief (their 34th assignment in the record), and the several propositions thereunder submitted, as said assignment and propositions are presented on pages 11 to 14 in appellants' brief.

* * * * * * *

377 8. This court erred in overruling appellants' assignment "VIII" presented in their brief (their 3rd and 4th assignments in the record), and the three several propositions thereunder submitted, as said assignment and propositions are presented on pages 61 to 66 in appellants' brief.

9. This court erred in overruling appellants' assignment "IX" presented in their brief (their fifth assignment in the record), and the two several propositions thereunder submitted, as said assignment and propositions are presented on pages 66 to 68 in appellants' brief.

10. This court erred in overruling appellants' assignment "X" presented in their brief (their 35th assignment in the record), and the several propositions thereunder submitted, as said assignment and propositions are presented on pages 68 to 70 in appellants' brief.

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* * * * * * *

25. This court erred in overruling appellants' assignment "XXV" presented in their brief (their first assignment in the record), and the two several propositions thereunder submitted, as said assignment and propositions are presented on pages 100 to 102 in appellants' brief.

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* * * * * * *

30. This court has erred in failing and refusing to decide each and all of the issues presented to the court by proper assignments of error and in failing and refusing to file conclusions of fact upon each of the material issues in the case properly assigned in this court, as is made the duty of this court by article 1024-A of the Revised Statutes of the State of Texas, enacted by the Legislature of 1905, to which this court is respectfully referred as authority and support of this specification.

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31. That the court erred in part of the opinion filed herein which says "that the undisputed evidence is such as to show that all appellants were partners and agents of each other and had a common agent in Deaf Smith County in such manner as to make them all subject to the jurisdiction of the District Court of that county", and citing the case of the Southern Kansas Railway Company of Texas against Crump, 74 S. W. Reporter, 335; because there is no evidence in the record in this case to show such partnership, and because the facts in the Crump case distinguished it from this case, and said Crump case is not controlling herein.

32. This court has erred in failing to file conclusions of fact specifying the particular conclusions of fact relied upon and bearing upon the issue of partnership and agency, so that the Supreme Court could determine upon writ of error whether or not the record justifies the conclusion of this court to the effect that the undisputed evidence shows that appellants were partners, and appellants request the court to find in detail the facts relied upon to support the conclusions of partnership and agency.

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36. Said opinion is inadequate, insufficient and erroneous, in that it does not present and dispose of all the several issues presented by assignments and propositions in appellants' brief.

Wherefore, Appellants show to the court that appellee, George W. Littlefield, resides in Austin, Texas, and appellees, J. P. White and T. D. White, reside in Roswell, New Mexico; that their attorney of record, J. A. Templeton, resides at Fort Worth, in Tarrant County, Texas, and that *they* attorneys Scott & Dunn, reside at Roswell, in Chaves County, New Mexico; and they pray that notice of the filing of this motion be served in the manner and

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form as prescribed by law, and that at a hearing thereof appellants have judgment reversing and setting aside the judgment and opinion rendered and filed herein, granting it a rehearing and on such rehearing that the judgment of the trial court herein be reversed and Judgment here rendered for appellants, or that this cause be remanded for new trial, and for costs, and general relief.

TERRY, CAVIN & MILLS,
Galveston, Texas;
MADDEN, TRULOVE & KIMBROUGH,
Amarillo, Tex.;
CARL GILLILAND,
Hereford, Texas,
Attorneys for Appellants, Eastern Ry. Co. of New Mexico, The A., T. & S. F. Ry. Co., The Southern Kansas Ry. Co. of Texas.

Endorsed: No. 6687. Eastern Ry. Co. et al. vs. Geo. W. Littlefield, et al. Amended Motion for Rehearing. Filed February 10, 1911. By order of the Court. J. A. Scott, Clerk. Filed in Supreme Court, May 3, 1911, F. T. Connerly, Clerk.

* * * * * * *

385 *Order Overruling Motion for Rehearing.*

Entered March 18, 1911.

6546–6687.

EASTERN RAILWAY COMPANY OF NEW MEXICO et al.
vs.
GEO. W. LITTLEFIELD et al.

This day came on to be heard the motion by appellants for a rehearing in this cause and the same having been duly considered by the court is hereby overruled.

386 Proceedings in the Supreme Court of Texas.

Petition for Writ of Error.

Filed April 15, 1911.

In the Supreme Court of the State of Texas.

No. —.

EASTERN RAILWAY COMPANY OF NEW MEXICO, THE PECOS & Northern Railway Company, Southern Kansas Railway Company of Texas, and Atchison, Topeka & Santa Fe Railway Company, Petitioners,

vs.

GEORGE W. LITTLEFIELD, J. P. WHITE, and THOMAS D. WHITE, Respondents.

Appealed from the District Court of Deaf Smith County, Texas; judgment affirmed by the Court of Civil Appeals for the Second Supreme Judicial District at Fort Worth, Texas, and appellants' motion for rehearing overruled.

Petition for Writ of Error.

To the Honorable Supreme Court of the State of Texas:

Your petitioners, The Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka & Santa Fe Railway Company, respectfully represent to the Court as follows:

First. This suit was begun in the District Court of Deaf Smith County by the filing of plaintiffs' original petition on March 23, 1908, and the case was carried on the docket of said Court as No. 232, entitled Geo. W. Littlefield, et al., vs. The Eastern Railway Company of New Mexico, et al. Tr. 1. Judgment went against the defendants, and they appealed to the Court of Civil Appeals of the
387 Second Supreme Judicial District, at Fort Worth, and the case was carried on the docket of that court as No. 6686, entitled Eastern Railway Company of New Mexico, et al., appellants, vs. George W. Littlefield, et al., appellees.

Second. Plaintiffs in their petition allege that they were owners of cattle which they desired to ship over the lines of defendants from Bovina, Texas, and Kenna, New Mexico, to St. Joe and Kansas City; that they made application for cars at Bovina on May 9, 1907, requesting cars to be furnished on September 15th, fifty (50) cars, and on October 15th, fifty (50) cars at Bovina, and on September 1st, fifty (50) cars, and September 15th, fifty (50) cars, at Kenna; that the defendants accepted the order, but failed to furnish the cars, except some twenty-eight (28) which they admit were duly furnished; that about the latter part of July, the defendants re-

quested plaintiffs not to bring cattle to the station to be loaded until they were notified by defendants so to do; that on this notice plaintiffs refrained from bringing their cattle in to be shipped until the 10th day of September, 1907, when learning that some cars would be at Kenna about that day they brought in and shipped from said station, said twenty-eight cars; that they thereupon requested through the agent at Kenna that defendants should furnish them at said station on September 15, 1907, the remainder of the one hundred (100) cars that they had previously ordered for said station, and to furnish there at Kenna the one hundred (100) cars which they had previously ordered for Bovina, requiring the same to be furnished on October 15th; that plaintiffs brought some thirty-nine hundred (3900) head of cattle to Kenna, and tendered them for shipment on or about the 9th day of September, 1907; that defendants refused to receive or accept the cattle, and refused to ship the same or furnish cars, and that plaintiffs were forced to hold said cattle for several weeks' arrival of cars; that on October 18th, plaintiffs learned definitely that defendants would not furnish the cars until
388 several weeks thereafter; whereupon the plaintiffs abandoned their purpose of shipping their cattle during that season, and returned them to their ranch, a distance of about one hundred (100) miles; plaintiffs further allege that if defendants had furnished the cars to transport said cattle, they would have received certain amounts for them in Kansas City or St. Joe, and go into considerable detail in figuring out the profits that they lost by not getting to the market, and asked for damages accordingly in the sum of Thirty-five Thousand Nineteen ($35,019.00) Dollars, also asked for damages for expenses for feed for the cattle, and for attention to them while they were being held at Kenna, $2,000. Tr. 2-10.

They afterwards filed an amended petition on November 1, 1909, but it is not necessary, for the present purposes to re-state this petition, which occupies several pages of the transcript, which claims the same amount of damages. See pages 11-20. The defendants except the Pecos & Northern Texas Railway Company, presented in limine a plea to the venue. Tr. 21. The defendant, The Pecos & Northern Texas Railway Company, filed a separate answer, consisting of general and special demurrers, general denial, and special answers. Tr. 23-27. The defendant, Eastern Railway Company of New Mexico, filed its answer adopting the answer of the P. & N. T., and also presented a special answer, Tr. 29, 30. The defendants, Southern Kansas Railway Co. of Texas, and the Atchison, Topeka & Santa Fe, filed a separate answer, adopting the answer of the Pecos & Northern Texas. Tr. 31. The plaintiffs filed a supplemental petition. Tr. 32, 33. Defendants were permitted to file trial amendment setting up negligence and contributory negligence on the part of the plaintiffs. Tr. 35, 36. There was a trial to a jury, and a verdict and judgment for Eleven Thousand Fifteen and 55-100 ($11,015.55) Dollars in favor of all the plaintiffs against
389 all of the defendants jointly and severally. Tr. 166.

There was a motion for new trial and an amended motion, which was overruled, Tr. 167, 172; notice of appeal duly given, Tr.

173. Appeal bond filed within the time allowed by law. Tr. 175. Assignments of error were duly filed in trial court, Tr. 176. Statement of facts filed in the trial court, and also filed in the Court of Civil Appeals in due time, together with transcript of record. The Court of Civil Appeals on January 28, 1911, filed its opinion and entered its judgment affirming in all things the judgment of the trial court. On February 10, 1911, appellants filed their motion for rehearing in the Court of Civil Appeals. The Court of Civil Appeals took exceptions to this motion upon the ground that it was disrespectful to the Judge delivering the opinion of the Court, and entered an order striking motion for rehearing from the docket. On March 7th, appellants filed their motion to set aside said order, striking their motion for rehearing from the docket, disavowing any intention to be disrespectful to the Court, and asking that an amended motion for rehearing that they had prepared and submitted with said motion to set aside be filed in lieu of their said original motion for rehearing, which had been ruled by the Court to be obnoxious. On March 11th, the Court entered its order granting said motion to set aside the order, striking out appellants' motion for rehearing in so far as to permit appellants to file their said amended motion, and ordered the same to be filed as of the date of the filing of the original motion, and accordingly said amended motion was filed as of date February 10, 1911. On March 18, 1911, the amended motion for rehearing was in all things overruled, all of which will appear from the record accompanying this petition.

Third. The Court of Civil Appeals in its opinion does not
390 make any statement of the substance of the testimony, or any detailed findings of facts, for which reason petitioners ask leave of the Court to make under the different grounds of error hereinafter set forth such statements from the record as may be necessary to enable the Court to pass upon the grounds of error assigned. The petitioners will also reserve the statement of the holdings of the Court of Civil Appeals on the various issues, and the statement of such portions of evidence as petitioners rely upon to show that the Court of Civil Appeals erred in matters of law to be stated under the appropriate grounds of error hereinafter set out.

Fourth. Your petitioners now apply to Supreme Court for writ of error to the end that said Court may review the said cause and the action of the Court of Civil Appeals therein, and correct such action, and as reasons and grounds for the granting of such writ of error, your petitioners assign the following errors committed by the Court of Civil Appeals in affirming the judgment of the trial court in said cause, and in refusing petitioners a rehearing. Your petitioners were the defendants in the trial court, and appellants in the Court of Civil Appeals, and as they are petitioners here occupying a position somewhat analogous to that of appellants, they will be referred to hereafter as appellants; the respondents named in this petition were plaintiffs in the trial court, and appellees in the Court of Civil Appeals, and for convenience will be referred to in this application as appellees.

First Ground of Error.

The Court of Civil Appeals erred in overruling appellants' first assignment of error in said court to the effect that the trial court erred in refusing to consider and dispose of appellants' plea of privilege prior to the trial on the merits, and in ordering the same to be passed and submitted to the jury with the main case as shown
391 by their bill of exceptions. No. 1, which assignment is presented on page 2 of appellants' brief.

Statement.

Bill of exceptions upon which the assignment is based is shown on pages 39-42 of the transcript; it shows that when the case was first taken up prior to announcements, and prior to the filing of the answers of the appellants, who had filed plea of privilege, they presented and urged their said plea of privilege and requested the Court to hear the same before requiring said appellants to answer. Tr. 39, line 3 to line 17. The Court overruled appellants' request, and entered an order requiring said appellants to file their answers and proceed to trial, and directing that said plea of privilege should be considered by the jury on the trial of cause to which ruling of the Court appellants accepted. Tr. 41, lines 3 to 9. The Court of Civil Appeals overruled this assignment upon the ground that the undisputed evidence shows that all the appellants were partners and agents of each other, and had a common agent in Deaf Smith County, so as to make them all subject to the jurisdiction of District Court of that County.

The plea to the venue was in compliance with the statutes. Tr. 4. Appellees filed no answer to the plea of privilege. For further statement, we respectfully refer the Court to the statement following proposition under first assignment of error, appellants' brief in the Court of Civil Appeals, pages 2 and 3.

Authorities:

Revised statutes, article 1291, District Court, Rule No. 24;
Aldridge vs. Webb, 96 Texas, 122, 124.

Second Ground of Error.

Court of Civil Appeals erred in overruling appellants' sec-
392 ond assignment of error as presented on page 5 of their brief in said Court to the effect that the trial court erred in refusing to submit to the jury on the facts the issues of venue and of the jurisdiction of the Court, and in overruling appellants' motion for special issues and charges, and in holding that the undisputed evidence is such as to show that all the appellants were partners and agents of each other, and had a common agent in Deaf Smith County in such manner as to make them subject to the jurisdiction of the District Court of that county.

Statement.

See statement under first ground of error, also the following: The appellants requested the Court to submit to the jury special issues on the question of venue, asking the jury to find whether or not the appellants were partners, and whether or not the appellants constituted but a single through line of railway operated by the A. T. & S. F., the other appellants being but auxiliary lines. Tr. 151, lines 6 to 23. This the Court declined and failed to do. Appellants then requested a special charge submitting the issues as to venue, which was refused. Tr. 153, 154. The Court's charge submitted no issue on the question of venue. Tr. 144-151. We have set forth in our brief, beginning with page 5, the facts in substance as shown by the record on the question of partnership, agency, and subsidiary corporation. Appellees have made a fuller statement in their brief, beginning on page 3. The Court of Civil Appeals unfortunately makes no summary of the facts proved. As said statements are both in printed form and barring some conclusions contained in appellees' statement, which this Court will readily detect to be conclusions and not statements of fact, are substantially correct, and as the matter is quite voluminous, and would swell this petition to unusual length, we would like to ask the Court to depart from the rules far
393 enough to refer to those briefs for said statements.

Authorities:

G. C. & S. F. Ry. Co. vs. Lee, 65 S. W. 54;
Miller & Company vs. T. N. O. Ry. Co., 83 Texas, 518;
Railway vs. Dwyer, 75 Texas, 585;
Railway vs. Baird, 75 Texas, 265;
Brandon vs. Railway, 114 S. W. 540;
Peterson vs. C. R. I., 105 U. S., 364.

Remarks.

The Court of Civil Appeals, we submit, erred both in refusing to submit the issue of venue before requiring appellants to file their answers to the merits thereby forcing them to submit the issue of venue along with the issues going to the merits of the case, and also in holding that the testimony left no issue for the jury on the question of venue. Upon the first question, it matters not how overwhelming the testimony may have proved to be ultimately against the plea, it was a plea in abatement, and appellants had a right to have it disposed of, and have it out of the way before the issues on the merits were submitted. We ask the Court to look at the statements contained in the brief of counsel in the Court of Civil Appeals, and to look also at the statement of facts for the purpose of observing what a vast amount of testimony there is in the record which would have no place whatever in a trial on the merits. We think that it was highly prejudicial to the appellants to have all this mass of testimony submitted to the jury in connection with the merits of the case. It not only caused confusion, distracted the minds of the

jurors by largely increasing the volume of the testimony, and going over questions not connected with the merits, but by going into the testimony exhibiting maps and folders of a great trans-continental so-called system of railroads, of which these appellants were
394 held up as parts and branches, there was a distinct tendency to create prejudice in the minds of the jurrors. The Court can see it much more clearly than we could express it, and we need not make further argument upon the point.

Again, we submit that there was, to say the least of it, an issue of fact for the jury to determine whether or not there was any such relation between the appellants as to make them all sueable in the District Court of Deaf Smith County by virtue of the fact that one of them had a local agent in that country, and had a line of road extending through the country. We do not understand that the Buie case goes to any such extent as holding that the circumstances of such a case as this established partnership or agency as a matter of law, and leave no question of fact for the jury. Certain it is that no express partnership or agency is proved. If partnership or agency is established at all, it is by inference from circumstances, and wherever this is the case, it is with exceedingly rare exceptions, always a question for the jury as to what inference has to be drawn from the circumstances proved. Here, again, the Court is much more familiar with the rule that we are attempting to state and with *his* ramifications and modifications than anybody else, and we need not do more than merely state the point.

In passing, we call attention to the use and abuse of the so-called Santa Fe folder in this record. Surely with an instrument of such doubtful import and admissibility relied upon so extensively for the conclusive proof of the alleged facts, there well may have been a question for the jury. Brandon vs. Railway, supra.

Third Ground of Error.

The Court of Civil Appeals erred in overruling appellants' third assignment of error shown on pages 11, 12, 13 of their brief,
395 and the proposition submitted under it, raising in different forms substantially the same questions as have already been presented under the second ground of error.

Fourth Ground of Error.

The Court of Civil Appeals erred in overruling appellants' fourth assignment of error, and the propositions thereunder as presented on pages 14, 15, 16, 17, 18, 19, 20 of appellants' brief in said Court of Civil Appeals; said assignment of error is as follows:

"The trial court erred in refusing to give in charge to the jury, Special Charge No. 6, requested by defendants, which is as follows:

"If the jury find for the plaintiffs and also find and believe from the evidence that any of the cattle driven to or near Kenna were

owned by Littlefield, the Whites and one Wilkerson, at the time they were so driven, and not by Geo. W. Littlefield, J. P. White and T. D. White, alone, you will not consider in estimating the amount of damages to be awarded any such cattle as may have been then partly owned by Wilkerson, but consider only those owned exclusively by plaintiffs; and in this connection you are charged that the fact that Wilkerson may have owed for the purchase price of such cattle, or his interest therein, will not destroy his rights therein at that time and you will not consider such fact. Tr. 192-193."

The first proposition under said assignment is as follows:

"It was error for the Court to refuse to give in charge to the jury, special charge No. 6, requested by the defendants and refused by the Court."

The second proposition presented under said assignment is as follows:

"The Littlefield Cattle Company, composed of George W. Littlefild, J. P. White and Thomas D. White, could not legally sue
396 for and recover damages caused by injury to cattle owned by a firm composed of Littlefield and Wilkerson."

The third proposition under said assignment is as follows:

"It was material and reversible error under the facts of this case for the Court so to charge the jury as to allow them to find damages in favor of Littlefield Cattle Company, a firm composed of George W. Littlefield, J. P. White and Thos. D. White, on account of injuries inflicted on cattle shown by the evidence to belong to another firm composed of Littlefield and Wilkerson."

The Court of Civil Appeals in its opinion overruling this assignment, says: "There was some evidence indicating that one Wilkerson owned an undivided interest in a portion of the cattle driven by plaintiffs to Kenna for shipment, in view of which appellants requested the following charge. * * *

After quoting the charge requested by appellants, and refused by the trial court, the Court of Civil Appeals says:

"It may be that Wilkerson owned an interest in such cattle under such circumstances as that the plaintiffs could not recover for his interest, but it would hardly follow that they could not recover for their own interest, and the charge is, therefore, a little too favorable to the defendants, when by it the jury are told not to consider at all any cattle not owned exclusively by the plaintiffs. Waggoner vs. Snody, 82 S. W. Reporter, 355; 85 S. W., 1132."

Appellants in the fourth subdivision of their amended motion for rehearing alleged as one of the grounds thereof that "This Court erred in overruling appellants' assignment 'IV,' presented in their brief (their thirty-ninth assignment in the record), and the three several propositions thereunder submitted, as said assignments and propositions are presented on pages 14-20 of appellants' brief."

397 Appellants presented as the thirty-third ground of their amended motion for rehearing the following:

"This Court has erred in that part of the opinion reciting that 'there was some evidence indicating that one Wilkerson, owned an undivided interest in a portion of the cattle driven by plaintiffs to

Kenna for shipment, in view of which appellants requested the following charge, (quoting the charge requested and continuing), it may be that Wilkerson owned an interest in such cattle under such circumstances as that plaintiff could not recover for his interest, but it would hardly follow that they could not recover for their own interest, and the charge is, therefore a little too favorable to defendants, when, by it, the jury are told not to consider at all any cattle not owned exclusively by the plaintiffs." Such part of said opinion is erroneous for the following reasons:

(*a*) The evidence shows positively and uncontradictedly that Wilkerson was the owner of an undivided interest in two brands of the cattle, amounting to fully one-half, if not a little over one-half of the entire herd in controversy.

(*b*) Under the undisputed facts, it is a correct proposition of law that plaintiffs were not entitled to recover at all on account of the damages alleged to have been sustained by Wilkerson's cattle, or Wilkerson's interest in the cattle.

(*c*) Even if the charge requested "is a little too favorable to the defendants" the same is sufficient to require and did require of the trial court that he give a correct charge upon the proposition, and the trial court erred in that he failed to give a correct charge upon the issue presented by the special charge, for which error this Court should have reversed and remanded the case for a new trial."

398 *Statement.*

The plaintiffs sued as composing the firm of Littlefield Cattle Company without alleging that they were incorporated, and without alleging that they were partners. Tr. 1, 5, 11, 15. It is alleged that the cattle were never shipped, that the cars were ordered but not furnished. There is no allegation of any contract for the transportation of the cattle, nor is there any proof of a contract for transportation. Tr. 1-20.

C. W. Walker, a witness for plaintiffs, testified that a man by the name of Wilkerson had an interest in those cattle that were turned loose at Kenna, after plaintiffs decided that they would not ship the cattle, to go back to the ranch or range from which they had been gathered; that Wilkerson owned an interest in that herd that were not taken to the Yellow House ranch; that in gathering the cattle for shipment they had not observed any regard for different brands, and had not distinguished between the cattle owned by Littlefield and Wilkerson and those owned by Littlefield and the White Brothers; that they were going to ship cattle in which Wilkerson had an interest the same as those that he did not have any interest in. Littlefield and Wilkerson each owned a half interest in H U T brand and Wilkerson owned one-fourth interest in A X L brand and Littlefield the other three-fourths. He did not know how many of the Wilkerson cattle there were in the herd of three thousand nine hundred (3,900) or four thousand (4,000) head. Tr. 58, line 2 and continue to line 6, pages 59, 60.

J. P. White, one of the plaintiffs, testified that the herd was

known as the Wilkerson cattle, but that Wilkerson owned no interest in them; that Wilkerson had not exercised any control over these cattle since 1904-05, when he went to Canada; that
399 Wilkerson came back a year or year and a half prior to the time of the trial; that they had different brands of cattle with different interest- in the several brands; that plaintiffs had bought Wilkerson out when he last went back to Canada; that it is a fact that Mr. Wilkerson, who went to Canada owns a half interest in one of the brands, and a fourth interest in another; but that he owes Major Littlefield for it; and this was the reason why the witness stated on direct examination that plaintiffs owned the cattle; that Wilkerson owes Littlefield for the cattle, but Wilkerson had told witness that it had been closed up, by which he understood that Major Littlefield had become owner of Wilkerson's interest in the two herds of cattle; that it is not a fact that Wilkerson still has an interest in the cattle and owes for them, but it is a fact that at the time the shipment was offered, and the cattle turned back to the ranch, Wilkerson still owned the cattle but owed for them, and the matter was wound up after Wilkerson came back from Canada in 1908. Tr. 93, from line 1 to 16; p. 94, line 8 to p. 95 line 9.

Thomas D. White testified that Wilkerson had bought some of the cattle, but had not paid for them, and was in Canada at the time; that J. P. White was controlling the cattle as manager of the ranch; that the Wilkerson cattle had been attended to by J. P. White as manager of the Littlefield Cattle Company for about five (5) years, and Wilkerson had not given them any attention; that Wilkerson owned a half interest in one brand and a fourth interest in another brand of these cattle, and left them there on the ranch in care of J. P. White; that Wilkerson actually owned his interest in the cattle, but owed for them. Tr. 65, lines 7 to 21.

The appellants requested the court to give in charge to the jury, special charge No. 6, as quoted in the assignment, which the
400 court refused. Tr. 161. 162. The charge of the court nowhere submitted this issue to the jury, but treated the entire herd as the property of plaintiffs. See the entire charge. Tr. 144-151.

Authorities:

St. L. & S. W. Ry. Co. vs. Jenkins, 89 S. W., 1106.
Holliman vs. Rogers, 6 Tex., 91.
G. H. & S. A. Ry. vs. Le Gierse, 51 Tex., 189.
G. C. & S. F. Ry. vs. Bartlett, 75 S. W., 56.
G. H. & S. A. Ry. vs. Stockton, 38 S. W., 647.
G. C. & S. F. Ry. vs. Cusenberry, 26 S. W., 43.
Roland vs. Murphy, 66 Tex., 534, 538.
Lee vs. Turner, 71 Tex., 264, 266.
Zwernerman vs. Rosenburg, 11 S. W., 150.
G. H. & S. A. Ry. vs. McGray, 43 S. W., 275, 276.
E. L. & R. R. R. R. Co. vs. Culberson, 68 Tex., 663, 667.
F. W. & D. C. Ry. Co. vs. Wilson, 85 Tex., 516, 518.

Argument.

Beginning with Holliman vs. Rogers, 6 Texas, 91, our courts have steadily held that there is a distinction between a defect of parties plaintiff and a defect of parties defendant; that a defect of parties plaintiff need not be taken advantage of by a plea in abatement, but may be taken advantage of whenever the defect is developed, or even in the appellate court. This doctrine was first announced in said case of Holliman vs. Rogers, and was applied in that case to a suit on contract. The same doctrine has been applied, however, in suits on torts and on statutory actions. For instance, in the Culberson case, supra, which was an action for tort resulting in death based upon the statute, the court said: "When the evidence developed the fact that the deceased had a mother, the proceedings should have been arrested until she was made a party, or the petition was amended so that the suit would proceed for her use as well as that of the other beneficiaries. * * * It is analogous to the case of a partition in which it is held that if the proof makes it manifest during the progress of the trial that one of the co-tenant owners is not before the court, it is the duty of the court to suspend the trial and require such co-tenant or part owner to be made a party."

401 In Roland vs. Murphy, supra, the action was in tort for injury to property owned by tenants in common. There the court said at page 538: "The question then is whether one tenant in common can maintain an action of this character and recover the entire damages to the common estate. The negative in this proposition is established in the case of May vs. Slade, 24 Texas, 205, which is in harmony with the rulings of the English courts, and with the rulings of the other states in this union. The rule prevents a multiplicity of suits and denies a recovery to one co-tenant for the entire damage done to the common estate, because a judgment in favor of one co-tenant alone rendered in an action to which he was sole plaintiff would not bar the right of another co-tenant to recover on the same cause the action in his own right to the extent of the damages to which he would be entitled for injuries done to his interest in the common property. One co-tenant in such case is not the representative of another."

The testimony by the findings of the Court of Civil Appeals itself, does raise the question as to the ownership by Wilkerson of an interest in a part of the cattle. The court says: "There was some evidence indicating that one Wilkerson owned an undivided interest in a portion of the cattle, etc."

The court also finds that Wilkerson owned an interest for which the plaintiffs could not recover saying, "it may be that Wilkerson owned an interest in such cattle under such circumstances, as that the plaintiffs could not recover for his interest." See the opinion of the Court of Civil Appeals in this case.

The court then proceeds to rule that it would not follow
402 that plaintiffs could not recover for their own interest in the cattle and that therefore the charge was "a little too favorable

to the defendants," because it told the jury not to consider at all any cattle not owned exclusively by the plaintiffs.

The ruling of the Court of Civil Appeals is most obvious error. In the first place, while the testimony does show that Wilkerson owned a one-fourth interest in one of the brands of cattle in question and a one-half interest in another one of the brands, appellees did not prove, or offer to prove, or submit any testimony tending to prove what part of the whole cattle upon which damages were claimed, these two brands constituted. Nor were the appellants able to make any proof establishing definitely the number of cattle in which Wilkerson was interested, though the proof shows that he was interested in a large number of them. Now, adopting the most favorable rule which could be applied to the case, the plaintiffs, respondents, here, were bound to allege and prove, or, at least, to prove the extent of their ownership in the cattle. The burden was not upon the appellants to allege and prove the interest, if any, in said cattle, which was outstanding in other persons not parties to the suit. As soon as it appeared from the testimony that there was another person not a party plaintiff who owned an interest in the subject matter of the suit, the case should have been halted, as is expressly held in the Culberson case, supra, until that interested party was brought in, or, at least until the extent of his interest was established and excluded. If the appellees would escape the necessity of stopping the case until Wilkerson could be brought in, the burden certainly was upon them to show the extent of his interest, and to have it excluded from the measure of their recovery or have him brought in as a party to the suit. If the findings of the 103 Court of Civil Appeals are correct, therefore, then the law of the case under the testimony was correctly stated in the charge which the appellants requested. That is, since the extent of Wilkerson's interest had not been shown, the brands in which he had an interest should have been entirely excluded from the consideration of the jury in estimating the damages, and they should have considered only those cattle which the testimony showed to belong exclusively to the appellees. There was no other means under the state of the proof by which the appellants could be protected from a double recovery. Beyond doubt, under the charge of the court these appellees were authorized to recover the whole damage to all the cattle, and beyond doubt, such recovery would be unavailing to the appellants if Wilkerson should sue them for injury to the cattle in which he was interested. The burden of removing these difficulties in the way of a recovery was upon the appellees.

It is not true, as the Court of Civil Appeals holds therefore, that the charge requested by the defendants in the trial court, who are petitioners here, was "a little too broad." But if the special charge requested was not exactly correct, it certainly was sufficient to call the attention of the trial court of the fact that there was an outstanding interest in a large number of the cattle in the man Wilkerson, and it thereupon became the duty of the court to give the proper charge covering this phase of the case. Instead of doing this, the court simply refused the special charge requested by the appellants.

Furthermore, in this case, the suit was a joint suit by Littlefield and the two Whites, composing the Littlefield Cattle Company against the railroads. The cattle in which Wilkerson was interested belonged to him and Littlefield. The two Whites had no interest in them. They and Littlefield suing jointly certainly could
404 not legally recover for damages to cattle belonging to Littlefield and Wilkerson jointly. Still more clearly they suing jointly could not recover Wilkerson's interest in the damages to cattle belonging to him and Littlefield jointly. In this respect, this case is easily distinguishable from the Snody case cited by the Court of Civil Appeals. There Snody was suing alone and the question was whether he could recover damages to stock which belonged to him and others. There were no persons joined with him who had no interest in the property, as is the case with Littlefield here, who has joined with him as plaintiffs in this suit two persons who have no interest whatever in the Wilkerson cattle.

As to the question of bailment, it is not in this case. In the Snody case the court said:

"The Court of Civil Appeals did not find that he (Snody) was a bailee, nor do they state facts from which such a conclusion can be drawn."

The same is true precisely in this case. The Court of Civil Appeals does not find that Littlefield, or Littlefield and the two Whites, were bailees of the cattle in which Wilkerson owned an interest.

In the Snody case it is further said:

"Reference to the testimony shows that the only evidence which bears upon that question is that Snody, himself, stated that he had received the horses about five years previous to that time from Ellerd 'on the shares,' but no statement is made of any contract by which he claimed the right of possession, management, and control of the property."

The same is equally true here. The cattle, both those in which Wilkerson owned an interest and those in which he had no interest, were on the range. J. P. White testified simply that Wilkerson owned a half interest in one brand of the cattle and a fourth interest in another brand; that Wilkerson had not exercised any control of these cattle since 1904-05, when he went to Canada, the
405 cattle being controlled by the witness all the while; that it was a fact that Wilkerson owned a half interest in one of the brands and a fourth interest in another, but that he owes Major Littlefield for them. This testimony certainly does not make out any such clear case of bailment as authorized the trial court to instruct that plaintiffs were entitled to recover as bailees without submitting any issue on that question to the jury.

Tom White testifies that Wilkerson had bought some of the cattle, but had not paid for them; that J. P. White was controlling the cattle "as manager of the ranch." This, however, is a mere conclusion, and J. P. White did not state that he had control of them as such manager. But, supposing that the statement of Tom White is to be taken as true, as a matter of fact, that is that J. P. White was controlling the cattle as the manager of the ranch. It is still true as the court said in the Snody case that "no statement is made of any

contract under which he (that is, J. P. White in this case) claimed the right of possession, management, and control of the property." So that the Snody case decided by this Court, 85 S. W., 1134, 98 Tex., 512, so far from being an authority in support of the contention of the appellees in this case, directly supports the contention of your petitioners. We call further attention to this expression in the opinion of this court in that case.

"The plaintiff's right being to recover his proportionate part of the damages, in order to establish that right it devolved upon him to show with reasonable certainty the extent of his interest in the property."

It results therefore that the state of the evidence was such that the appellees in this case could not recover damages on any of the herds in which Wilkerson owned an interest, for the reason that the testimony did not make reasonably certain what interest, if any, the appellees owned in these brands; the charge requested on behalf of appellants, your petitioners, was therefore correct, and should have been given.

We call the attention of the court further to the fact that there was no pleading by which appellees set up any bailment of any part of the cattle, or any right to recover as bailees, but on the contrary they alleged ownership. In the Cullers case, 81 Tex., 391, 392, which was cited and relied upon by appellees in the Court of Civil Appeals, the court said that the defendant in that case, notwithstanding the plaintiff's possession of all the property, "Ought to be permitted to prove title in a third party, not only for the purpose of disproving the plaintiff's right or rather claim for damages without an injury to himself, but also to avoid being compelled to respond in double damages for the same injury to the property. Until such outstanding title, or a title in the defendant is established however, the possessory right of the plaintiff is sufficient to justify a full recovery. Hence, it is correctly said that the actual possession of property is prima facie proof of the ownership thereof, but it amounts to no more than this."

In other words, possession may be prima facie proof of ownership, but when the facts with reference to ownership are developed, then the mere possession, which is all that was shown in J. P. White, ceases to be proof of ownership, and the actual facts with reference thereto will govern. Here the proof is undisputed that Wilkerson was the owner of an interest in two brands of the cattle. Conceding that they were in the possession of J. P. White, this either establishes bailment in the absence of a contract of bailment, or does it establish ownership as against the positive testimony of Wilkerson's interest. Appellees have, therefore, failed to meet the rule laid down by the Court in the Snody case, which requires them to show with reasonable certainty the extent of their interest in the damages to the Wilkerson cattle, because they have failed to show how many of these cattle there were, or the extent to which they were injured or the amount of damages for which defendants were liable.

We urge again that the charge requested by the appellants with reference to the Wilkerson cattle was under the state of the evidence

a correct charge, under the rule to which we have just referred laid down in the Snody case. But, if it was not exactly correct, it certainly was sufficient to call the court's attention to the fact that the testimony raised the issue as to the right of the appellees to recover on the Wilkerson cattle, and as to the extent of their right; and if the charge requested was not strictly correct, it yet became the duty of the court to submit a proper charge upon this phase of the case. As a matter of fact, the court gave no charge upon this subject, but in his main charge assumed, without question or qualification, that the appellees were entitled to recover the full damages which all the cattle thus necessarily including the Wilkerson cattle, had suffered; that this was error, and that the court should have given a proper charge is well settled by numerous decisions. Sherman vs. Greening, 73 S. W., 424, 425; G. C. & S. F. vs. Minter, 85 S. W. 477, 479; M. K. & T. vs. Smith, 108 S. W., 1196, 1197.

Your petitioners in their amended motion for rehearing presented as a fourth ground therefor the overruling of their fourth assignment of error and the propositions under it. They also presented as a thirtieth ground of said motion that said Court of Civil Appeals erred in failing and refusing to decide all of the issues presented and in failing and refusing to file conclusions of fact upon each of the material issues in the case. They also presented as the thirty-
408 third ground of their motion for rehearing in the Court of Civil Appeals the error of that court in reciting that there was some evidence indicating that one Wilkerson owned an undivided interest in the portion of the cattle driven by plaintiffs to Kenna for shipment, and in overruling the special charge requested by defendants upon the ground that it was "a little too favorable to defendants"; and in subdivision *c* thereof, the attention of that court was specifically directed to the duty of the trial court to have given a proper charge upon this phase of the case, if it should be held that the charge requested was not in all things exactly correct. We submit with much confidence that there was error on the part of the trial court, and on the part of the Court of Civil Appeals in the disposition of this matter, not only technical error, but material error affecting the merits of the case; directly affecting indeed the amount of the recovery, if any, to which the appellees were entitled.

Fifth Ground of Error.

The Court of Civil Appeals erred in its opinion and judgment in this case in overruling the fifth assignment of error and the several propositions thereunder, presented on pages 20-24, inclusive of appellants' brief in that court. The assignment is as follows:

"The trial court erred in giving in charge to the jury, the 10th paragraph or division of the 'Charge of the Court,' which is as follows:

"If you believe and find from the evidence that the plaintiffs or their employees in charge of said cattle which were held at Kenna for shipment were guilty of negligence in bringing said cattle into said station at the time the same were brought there, or in holding

said cattle near said station while waiting for cars wherein to ship same, and if you further find and believe from the evidence
409 that said cattle were injured or damaged as a result of such negligence, then you are instructed that plaintiffs cannot recover such damage, if any, as you find resulted from their own negligence, or that of their employees. And any and all injuries or damages so sustained by said cattle through the fault and neglect of the plaintiffs, are not recoverable in this suit and should be excluded from your consideration in assessing the damage, if any, which plaintiffs are entitled to recover." (Tr. 186.)

The first proposition under said assignment is as follows:

"Paragraph or division No. 10 of the Court's general charge to the jury is erroneous in that it is too general and does not properly apply the law to the issue made and arising out of the pleadings and the evidence in the case."

The second proposition under said assignment is as follows:

"It does not properly present the whole of the law as to the issues of contributory negligence arising upon the pleading and evidence as developed upon the trial."

Statement.

Defendants' plea of contributory negligence charges that the plaintiffs were guilty of contributory negligence in that: (*a*) After having been notified by Avery Turner not to do so they took their cattle from their accustomed range and pasture and drove them therefrom to Kenna without having first been notified and learned that cars were available for shipping, and said cattle were so driven to a place where they could not be cared for except at great expense and trouble and where they had not feed, water and facilities for caring for them; and (*b*) after so driving said cattle and learning that there were no cars available for their shipment, plaintiffs held them there for an unreasonably long time without proper
410 feed, water and care and without making proper efforts to protect and care for them. (Tr. pp. 35-36.) Plaintiffs allege in their pleadings that "about the latter part of July or first part of August, 1907, defendants, acting through said Avery Turner, requested plaintiffs not to bring their cattle to said station to be loaded until they were notified by defendants so to do. On receiving such notice plaintiffs refrained from bringing said cattle on to be shipped until on to-wit, the 10th day of September, 1907, when learning that some cars would be at said station at Kenna about that day they brought in and shipped from said station about 28 car loads of said cattle." (Tr. pp. 6, 16, near bottom of page.)

J. P. White testified for plaintiffs among other things as follows: "I received a written notice from defendant company not to drive my cattle to Kenna until cars were available in which to ship them and never received any notice that cars were available. Each time we made inquiries for cars at Kenna they told me either that they did not know when they could get the cars or that they would do the best they could. Notwithstanding, I had no notice from the company

or any one employed by either of the defendants notifying me that cars were available I brought in my cattle. I brought in one bunch and got them out without notice, that is the 28 cars I heretofore referred to. I saw they never would give me any notice. These cattle were brought in about the first of September, about 28 car loads of them. These were a part of the 200 cars that I wanted. I never received notice after that that I could get any more cars. After that, about the 9th of September, I brought about 3,800 or 3,900 head. I never brought any cattle for shipment except on these two occasions and brought them all to Kenna. No one of the defendants and no one at all at that time during the time from the 9th of September
411 until the 18th of October told me for certain that I was going to get any cars. When I asked any one about it they said that they would do the best they could, or that they did not know." (Statement of Facts, 39 line 18 to p. 40, line 3.)

It appears from the testimony of all plaintiffs' witnesses J. P. White, C. W. Walker, and Thos. D. White, that two herds were brought in and the plaintiffs had been in the cattle business for a long time; that they knew the range and the condition of the country; and that the cattle in question claimed to have been damaged were a second herd brought to Kenna after the first herd was brought and part shipped and part turned loose to go back to their accustomed ranch, and under these circumstances the cattle were held there.

Thos. D. White testified that he did not remember whether any feed was raised around Kenna or not, but he did not think there was; that they did not try to get any food for the cattle around Kenna at all; that they did not make any effort to get feed for the cattle nor any effort to feed them; that they just let them range on the grass and drove them back and forth to water and herded them back and forth letting them graze; that they knew all the time that the cattle were going down, losing flesh and strength and suffering from being so held and handled. (St. of Facts, 68, 69.)

The court charged the jury in the 10th paragraph of its charge in the language as quoted in the assignment above. (tr. p. 148-149). The court refused to give special charge No. 5, requested by defendants, directly applying the law to the facts proven, as will appear from the charge quoted in the next succeeding assignment herein presented and found on page 160 in the transcript.

Authorities:

I. & G. N. Ry. vs. Earnest & Bost. 77 S. W., 29.
T. & P. R. Co. vs. Edins, 83 S. W., 253.

412 *Argument.*

We will with the permission of the Court defer our argument on this ground of error, and present under the next ground of error, our argument on the two grounds together.

Sixth Ground of Error.

The Court of Civil Appeals erred in overruling the sixth assignment of error and the two propositions thereunder, presented on

pages 24, 25, 26 and 27 of appellants' brief in said court. The assignment is as follows:

"The trial court erred in refusing to give in charge to the jury, special charge No. 5, requested by the defendants, which is as follows:

"If the jury find from the evidence that the defendants were negligent and that because of such negligence plaintiffs are entitled to recover; and the jury also further finds from the evidence that after having been by Avery Turner notified of a car shortage and the defendants might not be able to furnish cars the plaintiffs drove their cattle from their accustomed range and pasture to or near Kenna without having first been notified that cars were available for shipping, and if such driving and holding the cattle near Kenna was negligence as the term negligence is defined in the court's charge, or if after reaching Kenna with such cattle plaintiffs held their cattle near Kenna on the prairie when they knew or reasonably should have known that they could not get cars to ship the same, and if such holding of such cattle was negligence, as that term is defined in the court's charge; then in either even- the plaintiffs would not be entitled to recover for any such injuries to said cattle, if any, or damage, if any, as may have resulted from such negligence of the plaintiffs or their employees." (Tr. 192).

413 The first proposition under said assignment is as follows:

"It was error to refuse special charge No. 5 requested by defendants, for that it properly presented the law as to the issue of contributory negligence, a material issue raised by the pleadings and the testimony, which was nowhere properly presented in the court's charge."

The second proposition under said assignment is as follows:

"It was error to refuse special charge No. 5, requested by defendants for that it made a direct application of the law to the facts proven directing the attention of the jury to the particular issues made by the pleadings and evidence which was not done by any part of the court's charge."

Statement.

Same as under the next preceding ground of error, and further, the special charge so requested by the appellants in the trial court, and was by that court refused. (Tr. 160).

Authorities:

Barns vs. D. C. E. St. Ry., 128 S. W., 367.
G. C. & S. F. Ry. vs. Schieder, 88 Tex., 152, 167.
M. K. & T. Ry. vs. McGlamory, 89 Tex., 635, 639.
M. K. & T. Ry. Co. vs. Rogers, 91 Tex., 52, 58.
M. K. & T. Ry. Co. vs. Smith, 101 S. W., 453, 454.

Also see authorities cited under fourth ground of error.

Remarks.

The issue of contributory negligence submitted in the court's general charge was two-fold: (1) Whether or not appellees were guilty

of negligence in bringing the cattle to the station at the time they did bring them there; (2) whether or nor appellants were guilty of negligence in holding said cattle near said station while waiting for cars.

The appellants' plea of contributory negligence was also two-fold:
(1) that appellees after having been notified by appellants
414 through Turner not to do so, took the cattle from their accustomed range and pasture and drove them into Kenna, without being first notified that cars were not available for shipping cattle, and that the cattle were under these circumstances driven to a place where they could not be cared for except at great expense and trouble, and where there were no feed, water, and facilities for caring for them: (2) that after so driving the cattle into Kenna and finding that there were no cars available for their shipment, appellees held them there for an unreasonably long time without proper feed, water and care, and without making proper efforts to protect and care for them.

The charge of the court was not framed so as to meet the phases of the question of contributory negligence which were raised by the pleadings. The court submitted the question whether the bringing of the cattle into the station at the time they were brought was negligence. The court did not submit the issue as to whether the bringing of the cattle in by appellees after they had been notified by appellants that cars could not be furnished, and before they were notified that cars were available was negligence. But this was the very issue of contributory negligence which the pleadings of the appellants rendered. The proof showed that the cattle were driven into Kenna several days before the first cars were to be there, even according to the terms of appellants' order for cars as modified and pleaded by them. The court's charge is framed so that it covers this circumstance as a question of negligence, and this only. The jury could not have supposed, in view of the proof just referred to, that the court by submitting to the jury the issue as to whether appellees were negligent in bringing the cattle into Kenna at the time they
did bring them in, had reference to anything else, except the
415 fact that they brought the cattle in ahead of time. But that was not the contributory negligence which appellees set up in their pleadings against the appellants at all, so that the charge was clearly not responsive to the pleadings. Neither was it responsive to the evidence, because the proof not only showed that the cattle were brought in ahead of time, but further showed without question that before the cattle were driven in from their accustomed range, the appellants through their representative, Avery Turner, had notified appellees that there was a car shortage; that cars probably could not be furnished for the cattle at the time they had been ordered, and had warned them not to bring the cattle into Kenna until they had a further notice from appellants, advising that the cars were available. This was the issue of contributory negligence which was tendered by the pleadings of the appellees, and it plainly was supported by the proof. They had a right therefore to have that issue submitted to the jury. The point made, there-

fore that the charge of the court on this subject was not responsive to the pleadings and the evidence, should have been sustained.

In like manner, the court in the second phase of the charge on contributory negligence lost sight of the pleadings and the proof. The charge submitted to the jury the question whether the holding of the cattle near Kenna by appellees while waiting for cars was negligence. But, the issue tendered by appellants' pleadings was whether appellees were negligent in holding the cattle at Kenna for an unreasonably long time without proper feed, water and care, and without making proper efforts to protect and care for them after learning that there were no cars available for their shipment. The testimony shows that appellants were duly notified by appellees not to drive any of the cattle to Kenna until cars were available; that appellees never received any notice from appellants that the cars were available for the shipment of these cattle; that each
416 time when appellees made inquiries for cars they were told either that "They did not know when they could get the cars, or that they would do the best they could." The testimony further shows that they held the cattle there without any encouragement to believe that the cars would soon be available, from the 9th of September until the 18th of October; that they did not try to get any feed for the cattle around Kenna; they made no effort to get feed for them, or any effort to feed them; that they just let them range on the grass and drove them back and forth to water; that they knew all this time that the cattle were going down, losing flesh and strength, and suffering from being so held. The testimony therefore, raised the issue which the appellees had tendered upon this phase of contributory negligence, but the court failed to submit it in its charge, and only submitted the issue as to whether appellees were guilty of negligence in holding the cattle near Kenna while waiting for cars. The jury undoubtedly must have understood this instruction to refer to the manner in which they were held, and not to the circumstances under which they were held, and to the time for which they were held.

The appellees requested a charge which did submit to the jury the issue of contributory negligence as they had pleaded it, and as they had developed testimony to sustain it. Their special charge No. 5, which was refused by the court, requested that the jury be instructed that if appellees after being notified by Avery Turner of the car shortage, and that appellants might not be able to furnish the cars, the appellees drove their cattle from their accustomed range and pasture to Kenna without afterwards having first been notified that cars were not available for shipping them, and if such driving and holding of the cattle was negligence then appellees would not be entitled to recover for injuries to the cattle resulting from the negligence of appellants, and further requested the court to
417 charge that if after reaching Kenna with their cattle, appellees held them on the prairie when they knew, or reasonably should have known, that they could not get cars to ship the same, and if such holding was negligence they could not recover for the damages so resulting.

The theory of appellants as to contributory negligence as pleaded by them being well supported by testimony they were entitled to have that theory submitted to the jury. They were entitled to have the law given in charge as it applied to the very facts alleged by them and supported by testimony. This the court's charge did not do, but the special charge which the court refused did do.

The reply of appellees to the effect that the special charge refused had the effect of instructing the jury that appellees could excuse themselves from the duty of furnishing cars by giving appellees notice that they could not do so on account of car shortage is not tenable. When the appellants notified appellees that cars could not be furnished in accordance with their order, this—if appellants were under the duty to furnish them—was a breach of their duty and gave appellees a right of action. But it did not give them the right to increase their damages by gathering and driving their cattle to Kenna. On the contrary it forbade their doing this. The very object of the notice was to prevent this augmentation of damages. It was entirely legitimate for appellants to protect both themselves and appellees from this augmentation of damages by notifying appellees that the cars could not be furnished on account of the shortage, and that they should not incur the damage which would result from moving the cattle from the range to Kenna before the cars were available. This was fair dealing on the part of appel-
418 lants. It did not of course excuse them from the breach of their duty—if such duty existed—to furnish the cars at the time requested, and for this breach of duty, if it existed, appellees had a right to sue and recover such damages as they suffered by reason of the breach. But they had no right, in the face of the notice, to expose their cattle to the additional injury of gathering them, driving them from their accustomed range to Kenna, and holding them there under adverse conditions awaiting the arrival of cars, and for this additional damage to recover from appellants. It was utter recklessness in appellees to drive their cattle to Kenna under these circumstances. Indeed the jury would have been justified in finding a deliberate purpose on appellees' part to injure their cattle for the purpose of increasing the amount of their recovery against the appellants. It was intolerable from every point of view. The testimony is undisputed that if the cattle had been held on the range they would have done well and gained flesh all through the month of October. If appellees had observed good faith and acted with ordinary prudence, therefore, they would have suffered no injury whatever from the breach of appellant's duty—if there was a duty—except from decline in market value. As to this it appears that there was no decline. The question involved therefore goes to the very heart of appellees' case—involves the whole of it. It is no mere technical quibble. It goes to the real merits of the case. There was most manifest error in the refusal of the charge requested by appellants.

The attention of the Court of Civil Appeals was called to the error in the fifth, sixth, thirtieth and thirty-fourth subdivisions of appellants' motion for rehearing. In this connection, we may add

that since the court in its charge did not at all submit the issue of contributory negligence as predicated upon the driving of the
419 cattle into Kenna after notice not to do so, the requested charge even if not quite correct, was sufficient to require the court to give a correct charge on this phase of the case, which was not done.

Seventh Ground of Error.

The Court of Civil Appeals erred in overruling the sixteenth assignment of error presented on pages 80 and 81 of appellants' brief.

The assignment is as follows:

"The trial court erred in refusing to give in charge to the jury, special charge No. 7, requested by defendants, which is as follows:

"If you find for the plaintiffs, in considering the amount of damages to be awarded, you will not allow anything for such expenses, if any, as may have been incurred in holding said cattle near Kenna, or damages thereto sustained, from the time the cattle were brought in until the time the cattle should have been shipped out." (Tr. p. 193.)

The proposition under the assignment is as follows:

"If liable at all, defendants were not liable for the expense of holding plaintiff's cattle on the range near Kenna from the 9th, the time White said they were brought to Kenna, to the 15th, the date that White said he was expecting to ship them under dates fixed by his car orders."

Statement.

The appellees in their pleadings alleged, as hereinbefore stated, that they made an order for 50 cars to be furnished at Bovina on September 15th, and 50 cars to be furnished there on October 15th, also 50 cars to be furnished at Kenna on September 1st, also 50 cars to be furnished there on September 15th; that on September 10th, they shipped 28 cars from Kenna, and at that time changed their order so as to require all the remaining cars which
420 they had ordered for Kenna to be furnished there on September 15th, and so as to require the 100 cars which had been ordered for Bovina, to be furnished at Kenna on October 15th. Appellees allege therefore, that it was the duty of the appellants to furnish them at Kenna 100 cars on September 15th, and 100 cars on October 15th. Tr. p. 16, line 7 from the bottom to 17 line 12 from the bottom.

The proof shows that appellees brought in the cattle to fill the 28 cars about the 1st of September, S. F. 33 (this refers to the second page numbered 33 in the statement of facts), and that they brought in "the other cattle, about 3,800 or 3,900 on about the 9th or 10th of September, S. F. 33, line 9 from the bottom to line 2 from the bottom. See also S. F. 62, lines 6 to 19.

The Court of Civil Appeals referring to the requested charge which is the subject of this assignment, after quoting the charge says:

"There is some indication in the evidence that at least some o
the cattle were brought into Kenna sooner than they should hav
been; but the charge requested was a little too broad and applied t
all of the cattle in controversy, when at least, a portion of then
were indisputably tendered at a seasonable time, it was therefor
properly refused."

We question the statement made by the Court of Civil Appeal
to the effect that at least a portion of the cattle were "indisputabl
tendered at a seasonable time." Taking the pleadings of appellee
and their proof together, they show that the 1,003 head of cattl
that were shipped out in the 28 cars came in after September 1s
and that the large herd, including some 4,000 head of cattle, cam
in on the 9th or 10th of September; whereas, the pleadings of th
appellees distinctly allege that as a result of their orders, the appe
lants were bound to furnish them 100 cars on September 15th, an
100 cars on October 15th. Tr. 17, line 18 from the botto
421 to line 13 from the bottom. The testimony of the witnesse
fixed the time when the first shipment came, as about th
1st of September, as shown above, but their pleadings distinctl
allege that having received notice from appellants not to bring th
cattle in until they were notified that cars were available, they re
frained from bringing in their cattle until the 10th day of Septem
ber, and when they learned that there were 28 cars that they coul
load, they then took in 1,003 head and shipped them out. Tr. 16
line 11 from the bottom to the bottom of the page.

Remarks.

No cars were due to be furnished by appellants to appellees unti
the 15th of September, but all of the cattle were brought into Kenn
prior to that date, the 1003 head some time between the 1st of Sep
tember and the 10th of that month, and the remaining 3900 hea
some time between the 9th of September and the 12th of that month
Under this view of the pleadings and the evidence, it can not b
stated as an undisputed fact that any of the cattle were tendered a
the time the cars were to be furnished, but there is, at least, testi
mony tending to support the conclusion that all of the cattle wer
brought in before any of the cars were due. Consequently the re
quested charge was literally and absolutely correct in the very term
in which it was asked. It is not denied by the Court of Civil Ap
peals, and it is obviously correct to say that the appellants were no
liable for any expense of holding appellees' cattle on the rang
near Kenna, nor for any damages sustained by the cattle from th
time that they were brought into Kenna, until the time when th
cars should have been furnished, and the cattle should have bee
shipped.

But, if it should be thought that the proof is undisputed that th
1003 head of cattle were brought in at a time when the appellee
were entitled to bring them in and tender them for shipment, s

that there was no question for the jury with reference to
422 them, still we urge that this would not render charge No. 7, requested by appellants erroneous. The language of the requested charge was simply general. It directed the jury that if a verdict should be found for appellees, then in determining the amount of damages, nothing should be allowed appellees for expenses incurred in holding the cattle, or for damages sustained by them "from the time the cattle were brought in until the cattle should have been shipped out." Now, whether all of the cattle came in before the cars were due, or whether only some of them came before the cars were due, the charge was correct, and could not have been misleading to the jury, because whether appiled to all of the cattle or only a part of them, it was still true that nothing should be allowed to the appellees, either by way of expenses, or by way of damages, from the time they were actually brought in until the time they should have been brought in. If there were any of the cattle that did not come in until after the cars were due for them, then, of course, the charge did not require that appellees should bear any expenses for them, or sustain any of the damages they might have suffered. But, all the expenses which were incurred on behalf of those cattle which were not brought in prematurely, and all the damage to those cattle that were not brought in prematurely, the jury could consider under the requested charge. It in no manner directed otherwise. It only charged that for any expense incurred or any damage suffered by the bringing in of cattle prematurely, the appellees could not recover; that for the expense incurred on and the damage suffered by the cattle from the time they did come in up to the time they should have come in, the appellants were not liable. Furthermore appellants did not sue for any expense on or damage to the 1003 head shipped out about September 10th, but only on the 3800 or 3900 head that they brought in on Sep-
423 tember 9th but never did ship. Tr. 17, line 7 from bottom to close of amended petition p. 20. The only cattle in the case, therefore, are the 3900 head brought in on Sept. 9th, and they were all brought in prematurely. So the charge was strictly correct as it was requested.

But, here again, is a matter going to the merits of the controversy, because the testimony shows that these cattle began to lose condition and to lose flesh, and that expenses began to be incurred on account of them from the very time they reached Kenna; that the deterioration in the condition of the cattle became noticeable within three or four days after they reached Kenna. S. F. 42, lines 1 to 5 and 15 to 25. The court's charge paid no attention whatever to this phase of the case. The fifth paragraph of the charge, Tr. 146, line 5 to the end of the paragraph, submits the case solely upon the theory that the cars were due on the 15th day of September, and in the following paragraph of the charge, the issue is submitted upon the theory that about the 9th day of September, the appellees brought about 3900 head of cattle to Kenna for shipment, and that appellants negligently failed to furnish them cars for that purpose. The eleventh paragraph of the charge, beginning on page 149 of the transcript, at the 13th line and continuing for the remainer of

that page and the next page, gives to the jury the measure of appellees' recovery. In so doing it instructs the jury to take the market value of the cattle on the Kansas City and St. Joe markets "to be estimated on the dates on which said cattle would have been so sold on said market." This leaves a clear inference that they were to take the market value at the time they would have arrived at St. Joe and Kansas City, if the cattle had been shipped out as soon as they were brought into Kenna. From that market value the jury was instructed to deduct the necessary expense incident to
424 transportation, and to deduct the market value of the cattle at Kenna at the time appellees abandoned the shipment, and to add the expense incurred by appellees in holding the cattle at Kenna while waiting for cars. It is perfectly clear that neither in determining the loss of market value or estimating expense did the charge permit the jury to take into consideration at all the fact that the cattle or any of them were brought into Kenna before the cars were due. But the charge made the appellants responsible for the whole expense of holding the cattle at Kenna, and the whole loss of the market value caused by bringing them in at the time they were brought, and holding them there until the shipment was abandoned. Even, therefore, if the extremely technical position taken by the Court of Civil Appeals to the effect that the requested charge was "a little too broad," should be correct, which is not the case, it still seems to us that appellants should be held to be within the rule that having requested a charge upon a phase of the case which was not covered by the court's charge, and which was raised by the evidence, it became the duty of the court to give a proper charge upon the phase of the case, even if there should be a slight error in the requested charge by which it was made "a little too broad." Are the appellants, or any class of litigants to be mercilessly hewn down, and their very rights and property stripped from them, where the real merits of the controversy are involved, by a technicality so extremely attenuated?

We respectfully direct the attention of this Court to the fact that on two of the issues of vital importance, reaching to the real merits of this case, the Court of Civil Appeals have turned the appellants away with the statement substantially that they are denied relief on account of slight technical errors. In refusing to sustain the
425 assignment basing error on the refusal of the court to give the requested charge with reference to the Wilkerson cattle, the Court of Civil Appeals is content to say that the requested charge was "a little too favorable to the defendants." See the middle of the second page of the court's opinion. Here, again, we are told with respect to a requested charge reaching to the merits of the case, that we cannot have relief from the error of the trial court, because the requested charge was "a little too broad." In both cases the court will find that the points involved in these requested charges were not substantially covered by the charge given by the court, and in both instances it ought to have been held by the Court of Civil Appeals, and we here now ask this Court to hold that if these requested charges were "a little too favorable," or "a little too broad," they were yet sufficient to direct the trial court's attention to these phases

of the case, and to impose upon that court the duty of giving a correct charge upon those phases of the case. The trial court having failed to do so, and the Court of Civil Appeals having failed to grant the relief which appellants should have on account of these substantial errors of the trial court, we ask this Court, as a court of last resort, to look well to the question of merit involved in these points, and not deny appellants relief where the very vitals and substance of the case are involved upon grounds so slight and so technical, if, indeed such grounds existed at all.

The appellants called the special attention of the Court of Civil Appeals to its error in respect to this assignment, in subdivision thirty-five of their amended motion for new trial.

Eighth Ground of Error.

The Court of Civil Appeals erred in overruling the third proposition under the 7th assignment of error as presented in appellant's brief in that Court (pages 28, 29, 51).

The assignment of error, so far as necessary to consider here, reads as follows:

"The trial court erred in overruling defendants' amended motion for new trial, and especially the 37th cause therein assigned for such new trial, which is to the effect that the verdict of the jury and the judgment rendered thereon are contrary to and unsupported by the law and the facts, in this:

* * * * * * *

(*b*) The facts show that the court is without jurisdiction over the subject matter in controversy herein, in that it shows that the four defendants are four distinct corporations, owning four distinct lines of road, each located in separate states and territories, and that they are not partners."

The third proposition under said assignment reads as follows:

"The Circuit Court of the United States has exclusive jurisdiction over the matter in controversy herein to the exclusion of state courts and the court at the conclusion of the testimony should have peremptorily dismissed this cause for want of jurisdiction, or submitted the issue of joint liability on account of the allegation of partnership and agency to the jury for their determination as a basis for determining the jurisdiction of the court."

Statement.

We refer the court to our statements in printed brief for appellees, pages 29 to 50, from which we make the following extracts:

Pleadings: George W. Littlefield, J. P. White and Thomas D. White, composing the firm of the Littlefield Cattle Company, sues the Eastern Railway Company of New Mexico, a corporation incorporated under the laws of New Mexico, the Pecos & Northern Texas Railway Company, a corporation incorporated under the laws of Texas, The Southern Kansas Railway Company of Texas, a corporation incorporated under the laws of Texas, and the

Atchison, Topeka & Santa Fe Railway Company, a corporation incorporated under the laws of the State of Kansas. The Eastern Railway Company of New Mexico has its principal office and place of business at Las Vegas, New Mexico, but has an office and an agent at Amarillo, Potter County, Texas, all of its line of road owned and operated by it being in New Mexico and no part thereof in Deaf Smith County, Texas. The Pecos & Northern Texas Railway Company has its principal office in Amarillo, Potter County, Texas, and its line runs through Deaf Smith County, Texas, where it has an agent. The Southern Kansas Railway Company of Texas has its principal office in Amarillo and its line of railroad owned and operated by it extending from Amarillo northeasterly to the Oklahoma line near Higgins, and no part of its line lies in Deaf Smith County, Texas. The Atchison, Topeka & Santa Fe Railway Company has its principal office and place of business at Topeka, in the State of Kansas and it has a local agent in El Paso County, Texas."

* * * * * * *

"It is alleged that plaintiffs ordered the cars and that defendants negligently failed and refused to furnish cars; that the cattle were brought to Kenna for shipment and held while waiting for cars on the prairie near Kenna, resulting in their damage. It is also alleged that they owned the cattle for which they ordered cars to ship and that plaintiff sustained the damages alleged to have resulted from a failure to furnish the cars."

It is alleged that the cars were desired and ordered for the purpose of shipping the cattle from Kenna, in the territory of New Mexico, to Kansas City and St. Joseph, in the state of Missouri (Tr.
428 15, from beginning of second paragraph to the 8th line of said paragraph); (also page 17, line 1 to line 30).

The evidence as to the relations of the companies to each other is shown by the testimony of Avery Turner and is set out on pages 31 and 32 of appellants' brief in the Court of Civil Appeals, as follows:

"Avery Turner further testified in substance as follows: That he is vice president and general manager of the Southern Kansas Railway Company, the P. & N. T. Ry. Co. and superintendent for the Eastern Ry. Co. of New Mexico, receives his instructions in reference to management of such lines of road from the president of the companies and from the board of directors, and with these limitations he has supreme authority over the lines under his control. (St. p. 67.) That live-stock originating on the Eastern Railway Co. of New Mexico going to Kansas City and St. Joseph, move over the Pecos & Northern Texas Railway Company, the Southern Kansas Railway Company of Texas lines and the line of the Atchison, Topeka & Santa Fe Ry. Co. and is billed direct from point of origin to point of destination, separate billing not being required, each company making billing reports to the other company and the company making collection makes remittances to such companies for their respective portion of the through rate, or combination of local rates as the case may be, to which each company is entitled; that bills of lading issued by the agents at place of origin are executed as agents for the

company by which they are employed; that the S. K. Ry. Co. of Texas, the P. & N. T. Ry. Co. and the Eastern Ry. Co. of New Mexico are not run under one common management and are not operated and controlled under the same officers; that they are under witness' supervision and management (St. 7-8); that the salaries
429 of the officers who are common officers of defendant companies whose line connect forming a line of railroad between Woodward, Okla., and Pecos, Texas, are paid 8 per cent by the A. T. & S. F. Ry. Co. and the remainder is divided, 28 per cent by the S. K. Ry. Co. of Texas, 29 per cent by the P. & N. T. Ry. Co., 41 per cent by the Eastern Railway Co. of N. M., and 2 per cent by the Pecos River Railroad; that such common officers do not get separate checks but the P. & N. T. Ry. Co. pays the salaries and makes bills against the other companies for their proportion of the bills so paid (St. p. 8); that the Agent of the P. & N. Ry. Co. at Hereford has authority to issue bills of lading for P. & N. T. Ry. Co. only; that such shipments as may be accepted on such bills of lading are handled by trainmen through to Roswell when destined over lines of the P. & N. T. Ry. Co. and the Eastern Ry. Co. of New Mexico; that the agents of the Eastern Ry. Co. of New Mexico issue bills of lading, which by agreement are accepted and transported over the line of the P. & N. T. Ry. Co. and the A. T. & S. F. Ry. Co. except such shipments on bills of lading issued by the P. & N. T. Ry. Co. and the Eastern Railway Co. of New Mexico without requiring separate bills of lading or shipping contract. (St. 8-9.)"

The witness J. P. White testified that on May 9th he ordered cars from W. S. Merrill, the local agent of the appellant P. & N. T. Ry. Co. at Bovina, Texas, requesting 200 cars to be furnished him for shipment of cattle from Bovina, Texas, and Kenna, New Mexico, to St. Joseph and Kansas City, Missouri, (S. F. p. 31, beginning with the 1st line of the 2nd paragraph and continuing to the middle of page 32; also page 37, beginning with line 19 and continuing to the end of page 38).

Authorities:

Act to regulate commerce as amended by the Act of June
430 30, 1906, Secs. 1 and 9.
Ry. Co. vs. More, 83 S. W., 362.
Parsons vs. C. & N. W., 167 U. S., 455.
Sheldon vs. Wabash, 105 Fed. R., 785.
Cent., S. Y. Co. vs. Ry. Co., 112 Federal, 823.
Edmunds vs. I. C. Ry. Co., 80 Fed., 79.
Van Patten vs. Ry. Co., 74 Fed., 981, 985.
U. S. vs. Mooney, 116 U. S., 104.

Remarks.

The evidence and the records show beyond contradiction that the defendants are four distinct corporations owning distinct lines which do connect as to form a through route from Kenna to Kansas City, Interstate. There is neither statutory nor common law rules that

would require the Eastern Railway Company of New Mexico, or either of the defendants, to furnish to plaintiffs cars to go beyond their own line. In other words, the Eastern Railway Company of New Mexico was under a statutory and common law obligation as a common carrier to furnish cars for the transportation, and to transport cattle from Kenna to Texico, the end of its line, but there is no rule that would have required it to furnish cars to go beyond the end of its own line; but under the Hepburn bill, interstate carriers are bound to furnish facilities for interstate transportation and facilities include the furnishing of cars according to the terms of the bill. This creates the liability and the only legal obligation of either of the defendants to have furnished cars for the transportation of stock beyond their respective lines interstate. Sections 8 and 9 of the Hepburn bill place the exclusive jurisdiction for failure so to do in the United States Circuit Courts, as will be seen from a reading of the act and the above decisions construing this and similar acts.

Ninth Ground of Error.

The Court of Civil Appeals erred in overruling the sixth and seventh propositions under the seventh assignment of error
431 as presented on pages 28, 55, 56 and 57 of appellants' brief in that court.

The assignment so far as necessary to be stated here, is as follows: "The trial court erred in overruling defendants' amended motion for new trial and especially the 37th cause therein assigned for such new trial, which is to the effect that the verdict of the jury and the judgment rendered therein are contrary to and unsupported by the law and the facts in this: * * *

"(*f*) There is no evidence sufficient to show any negligence whatever on the part of the defendants, or either of them, and the undisputed testimony of Avery Turner shows not only that defendants were not negligent, but that it was impossible for them or either of them to have complied with the demands of J. P. White for cars.

"(*g*) The evidence is conclusive and uncontradicted to the effect that there was such an unprecedented demand for cars and transportation facilities as that defendants were not only not negligent, but they could not possibly have furnished cars as requested, and to the effect that defendants' special pleas and answers were literally true and proven as alleged."

The sixth proposition under said assignment is as follows: "There was not sufficient evidence of negligence upon the part of the defendants, such as to create a liability for the acts complained of."

The seventh proposition under said assignment is as follows:

"The evidence is conclusive and uncontradicted to the effect that there was such unprecedented demand for cars and transportation facilities as that the defendants were not only not negligent, but they could not possibly have furnished cars as requested, and supporting literally the defendants' special plea of an unprecedented rush and demand for transportation facilities."

432 The Court of Civil Appeals, in its opinion, makes no finding whatever upon the issue of unprecedented rush and demand for cars. It sweeps the field perhaps with this general statement:

"The evidence is sufficient to support the verdict and judgments and it is unnecessary to cumber this opinion with a statement of its details."

Statement.

The appellants pleaded as a special defense that the demand for cars alleged by appellees was unreasonable and appellants were unable to comply therewith because their lines and parts thereof over which the cattle were to be shipped, were originally constructed and equipped in view of the condition of the country as they then existed and for a long time had been used and were reasonably sufficient for their business until about the year 1907, when there suddenly developed an unprecedented rush of people to the Southwest, buying lands, making homes and developing the country; that there was created thereby an unprecedented and unusual demand for transportation facilities to transport passengers and freight of all kind-, including livestock over their lines and connections, making such excessive, unusual and unprecedented demands for *motor* power, cars, track and facilities, that the same was not only not anticipated, but could not reasonably have been anticipated or foreseen by appellants or either of them; that by reason thereof the appellants, P. & N. T., S. K. Ry. of T. and A. T. & S. F. had been compelled to undertake the reconstruction of those parts of their lines over which it was necessary to transport the cattle in question, to improve the same by cutting down grades, straightening curves, building stouter bridges, installing more and better and
433 heavier equipment, putting in more and longer sidings and passing tracks and otherwise improving their properties and facilities; that at the time of the demand for these cars appellants were at a great cost and expense engaged in making such betterments; that in addition thereto the demand for motive power, cars, labor and the like, was so great throughout the country that it was not only impracticable, but impossible for appellants to have provided at the time said cars were required the necessary cars and motive power for the transportation of said cattle; that there were at said times various other persons, firms and corporations demanding cars and transportation facilities and defendants were by law required to do so and were furnishing such cars and transportation in the order of demands made, without discrimination between the parties making such demands, and it was impossible for them to furnish the cars demanded at the time stated and transport appellees' cattle as requested, without neglecting other demands and discriminating against other persons and firms contrary to provisions of the Federal law regulating interstate commerce. (Tr. 25, line 3 from bottom and continuing through page 26, and to line 10 from bottom on page 27.) See also Tr. 29, paragraph number 1; also transcript page 29, 2nd paragraph.

Avery Turner, manager of the P. & N. T., witness for appellees, testified on cross-examination for appellants as follows:

That he had been engaged in the railroad business, handling live stock shipments from this country and elsewhere, for the last thirty years; that from May to December, 1907, all kinds of freight, particularly building materials, farming implements, tools and living supplies, were required to be moved into the country to take care of the immense and unprecedented immigration into the country, in addition to the stock business to be moved out of the
434 country. The traffic to be moved both into and out of the country was very great during said period. The demand for facilities to handle such business was unusually great as compared with previous years; in fact greater than ever before in the history of these lines. The general traffic handled during the year 1907 increased 200 per cent over the year 1905, and 300 per cent over the years 1904 and 1903. There was a great increase in the amount of stock moved in 1907 over previous years, at least 50 per cent. There had not been such a demand previously on these lines. The demand was excessive and without precedents on these lines. For the stock shipping season in the spring of 1907, or the months of May and June, 1907, there were ordered 9,365 stock cars; for the fall stock shipping season the same year there were ordered 11,179 cars. There were shipped from these lines in the spring season of 1905 cars to the number of 5,160; in the fall season of the same year, 4,859 cars. In the spring stock shipping season of 1905 and average of 15 freight engines were required to handle the entire business; in the spring of 1907 an average of 33 freight engines were required to handle the freight business. That 281,200 miles of engines were required for the movement of business in the spring of 1905, while 480,350 miles of engines were required to handle the business for the same period in 1907. In the fall of 1905 an average of 12 engines handled the freight business, while for the same period of 1907 an average of 33 freight engines were required to handle the business. In the fall of 1905, 153,071 engine miles handled the business, while in the same period of 1907 it required 225,625 engine miles to handle the business. In the fall of 1905 an average of 737 cars of all kinds daily on the line were required to handle the business and during the season of 1907 an average of 1,231 cars
435 daily were required. The business for 1907 increased 100 per cent over 1905. The orders for cars were placed and parties desired to ship so many on the same dates that it was impossible to handle the shipments when they desired to make them. Shippers would go only on Fridays and Saturdays, figuring on Monday's market. For instance, on August 3, 1907, 178 cars were ordered; August 10 and 11, 467 cars were ordered; August 23 and 24, 359 cars; August 31, 213 cars; September 1, 292 cars; September 7, 321 cars; September 10, 341 cars; September 14 and 15, 546 cars; September 20 and 21, 749 cars; September 27 and 28, 409 cars; October 1, 239 cars; October 4 and 5, 540 cars; October 10, 11 and 12, 1,615 cars; October 15, 299 cars; October 18, 19 and 20, 1,088 cars, and so on (Statement of facts, beginning on the 2nd line from

bottom of page 16 and continuing through page 17 and to the end of line 19 on page 18). It was a physical impossibility to load so many cars of livestock as ordered on some of the dates in the fall of 1907 at the stock yards which we had. Besides this, shippers would trade at the pen and delay the loading and delay the cars and power so that many days it was impossible to get out more than one train of cattle from shipping pens at one point. That he was acquainted at the time with the car supply and motive power on the lines of these appellants and the lines with which they connected, and the same were insufficient to move the dead freight and livestock business tendered for transportation. The motive power and other facilities were amply sufficient to handle the livestock business which had been previously offered and in the manner in which it was offered in previous years. In the years previous to 1907, that is in 1905 and 1906, an average of 250 stock cars on line daily handled the stock business, while in 1907 there were actually on said lines 258 cars daily and these were insufficient to handle the business. (S. F. page 18, beginning with line 11 from the
436 bottom and continuing through said page and to the close of the first paragraph of page 19.)

Under normal or ordinary conditions the Eastern Railway Company of New Mexico owned sufficient cars with which to handle the business. In addition to this it was during the fall of 1907, and for a long time prior thereto, and has since that time been the practice on the part of these lines to secure cars for the handling of shipment of cattle and of other freight, from connecting lines, and for the fall season of 1907 these companies had an arrangement with the A., T. & S. F. Ry. Co., the C. M. & St. P. Ry. Co., the C. B. & Q., the Ft. Worth & Denver; in fact, with all railway companies whose lines might connect, directly or indirectly, with appellants' line, for the furnishing of such cars as might be needed in the loading of livestock or other freight on said lines for points on said other or connecting lines. Previous to the years 1906 and 1907, appellants had been able to obtain all cars necessary for handling livestock originating on their lines in this manner, paying therefor a per diem rental. Their financial condition was such that it was cheaper and better for them to make such arrangements for leasing and using cars of other railroads and of private stock car companies rather than to acquire cars of their own. Said Eastern Railway Company had about the same supply of cars in proportion to its business as other railroads in the Southwest had. All roads were short on cars and motive power, as well as other facilities for transporting traffic, on account of the unusual and unprecedented demand for the transportation of all kinds of freight tendered to such companies for transportation. (S. F. page 19, beginning with the 8th line from bottom and continuing through said page and continuing on page 20 to the 8th line from bottom.) Pages 21, 22 and 23, give a lot of details and statistics bearing upon this subject, which we will not take the space to set out.

437 Continuing on page 23, beginning with the second paragraph, the witness, Turner, further testified: The companies

were confronted during the year 1907 with extraordinary and unprecedented conditions. The business for the year 1906 was so great on account of the influx of people into the country that appellants' lines in their then physical condition were inadequate for the handling of the business; that it was necessary to reduce grades and take out short curves in order to handle greater tonnage and put more cars into a train; that sidetracks were not near enough to each other and not long enough for the passing of the required numbers of trains; that there were not sufficient watering and coaling stations and terminals at which to take the proper care and make the proper repairs of the necessary power; that it was seen that the requirements of the immigration would so increase the inbound freight that it, together with the outbound freight, including the livestock and products of the country, that the appellants' lines would not be adequate for handling the business. Accordingly reconstruction of these lines was decided upon as absolutely necessary for the protection and development of the country and its industries and the interest of the companies. This reconstruction, with the unusual and extraordinary amount of business which was offered to the companies at that time, very materially reduced the capacity of the lines and their facilities, their torn up condition necessarily causing slow handling of trains and light tonnage such as the engines could handle on the bad track. The Pecos & Northern Texas Railway Company or the Eastern Railway Company of New Mexico could not at that time have furnished the cars more promptly for the transportation of appellees' cattle without undue interference with their business and the rights of other shippers, and especially the rights of other shippers to have their property tendered for
438 transportation received and transported in the order tendered, and without showing preference to any person, firm or corporation; that cars could not be furnished to appellees before they were furnished for the reasons that their turn had not yet been reached in its proper order as required by the order books of the company, other shippers having placed orders ahead of them and not yet having their livestock moved. (S. F., page 23, beginning with the second paragraph and continuing through page 23 and through page 24 to the second paragraph.)

Authorities:

2 Hutchinson on Carriers, Sec. 495, page 538; Sec. 496, page 540.
4 Elliott on Railroads Secs., 1470 and 1551.
Di Giorgio vs. Penn. Ry. Co., 8 L. R. A. (N. S.), 108, note.
Galena, etc., R. R. Co. vs. Rae, 68 Am. D., 574; 18 Ill., 488.

Remarks.

The appellees did not in any manner plead any contract on the part of the appellants or any of them to furnish these cars at the time they were demanded. On the contrary, they simply set up their application and relied upon the duty of appellants to furnish

the cars in accordance with this application as modified. The doctrine, therefore, that where a railroad company contracts to furnish cars at a particular time, failure to do so is not excused by rush of business, does not apply to this case. On the other hand, it is well settled that an unexpected and unprecedented rush of business, such as the carrier could not reasonably have anticipated and provided for, will excuse the common law duty of furnishing cars when requested or demanded by prospective shippers, relying simply upon the general duties of the carrier to furnish cars. The testimony of the witness, Turner, is absolutely undisputed and uncontradicted that there was not only an unprecedented demand
439 for stock cars at this time, but that the somewhat sensational and spectacular growth and development of the country, with its undreamed-of increases of demands for transportation, has made it absolutely necessary for the appellants to undertake a reconstruction of their lines for the purpose of straightening curves, providing necessary and suitable sidetracks and switch tracks and terminal facilities, and for reducing the grade so as to increase the efficacy of their motive power and thereby increase the capacity of the companies to handle the business. The appellants were in the midst of this rebuilding and reconstruction at the time these cars were required to be furnished. It is undisputed also that the business throughout the country at large was everywhere taxing the transportation companies to their limit and beyond their limit for furnishing cars and moving the freight. Indeed, this is a matter of general knowledge. No one can well forget how the whole country, during the year 1907, was ringing with demands for cars and transportation facilities which the oldest, wealthiest and best equipped railroads in the whole country were unable to supply. There was scarcely a line in the United States which could meet the demands made upon it by its business, for cars and motive power. There was not a line in the entire west that could or did meet this demand. This situation was absolutely unprecedented in the history of the railroad business of the country. It is in proof in this record that such was the case and that without dispute. The law does not require a transportation company any more than any one else to accomplish impossibilities. These appellants did all that men could do under the circumstances. They notified their customers who had ordered cars for cattle shipments of the prevailing car shortage and of the probable impossibility of furnishing cars at the time they had been called for and had re-
440 quested these shippers not to bring their cattle into the stations, where there were no facilities for caring for them, until the companies gave notice that the cars would be available. This was an extra precaution which they were under no duty to observe, but they did it out of an abundance of caution and for the protection of their patrons.

Tenth Ground of Error.

The trial court erred in giving in charge to the jury the 11th paragraph or division of his charge, as quoted in the twenty-ninth

assignment presented in the Court of Civil Appeals, the thirty-third in the record, and the Court of Civil Appeals erred in overruling said assignment complaining of such charge; because the charge makes the measure of plaintiffs' damages the difference between the market value of the cattle at their proposed destination at the time they would have arrived had they been shipped when plaintiffs desired to ship, less expenses of transportation and their market value, or their intrinsic value, at Kenna, the proposed loading point, "when plaintiffs ascertained they could not procure cars in which to ship", when the true rule, where a carrier wrongfully fails or refuses to furnish cars, or to carry, is that the measure of the proposed shipper's damage is the difference between the value at destination when, if carried as demanded, the freight would have reached there, and its value at such time at the place whence it should have been taken, including the necessary expense of holding and the like, and deducting the reasonable expense of transportation.

Statement.

The trial court charged the law as to the measure of damages as indicated in their specification. See the 11th paragraph of the Court's charge to the jury, Tr. p. 149, beginning at middle of page and extending to near bottom on p. 150. Defendants complained of this charge by their thirty-third assignment in the record.
441 (Tr. p. 186, beginning near bottom of page), the twenty-ninth presented in the Court of Civil Appeals, beginning at top on p. 108 of appellants' brief and extending to near bottom on p. 111. This assignment and the several propositions thereunder presented were overruled by the Court of Civil Appeals practically without discussion. The cars were ordered for September 15th, when plaintiff loaded 28 cars which were shipped on order for cars to be loaded September 1st. (See plaintiffs' petition, Tr. p. 7, near top—also S. F., p. 37, beginning near bottom and reading to end of J. P. White's testimony.) The cattle were brought to Kenna about the 9th or 10th. (S. F., p. 36, 11th line from top, and middle of first line from bottom on p. 39 to top on p. 40.) Cattle were held until October 18th before shipper concluded not to ship, or "ascertained that he could not get cars." (S. F., p. 35, beginning from top, read to bottom; begin 11th line from top on p. 40, read to end of paragraph.)

Authorities:

N., K. & T. Ry. vs. Witherspoon, 38 S. W., 833;
I. & G. N. Ry. Co. vs. Startz, 33 S. W., 575;
I. & P. Ry. Co. vs. Nicholson, 60 Tex., 496-497;
Inman vs. Ry. Co., 37 S. W., 37;
G. & C. U. Ry. vs. Rea (Ill.), 68 Am. D., 574, 577;
North Transportation Co. vs. Clary, 66 Ill., 237;
Hutchinson on Carriers, 3rd Ed., Vol. 3, p. 1632, Sec. 1370.

Argument.

Plaintiffs claim to have ordered cars to be loaded on the 15th of September. J. P. White and others swear they brought in their cattle on the 9th or 10th. They say the cattle began to show signs of loss within about three days after arriving at Kenna, or some two or three days before they had a right to expect cars, even had not Turner given them notice not to bring their cattle. They did not get cars on the 15th and no promise of cars was ever made or a time limited *at* by the company until Turner, on the 16th of October, wired in response to telegram on the 12th. They held cattle from time they were brought in until the 18th of October, or a
442 month and nine days. The charge given allows all depreciation both before the cattle should have been shipped and that for a month after, regardless of plaintiffs' conduct. The true rule of law, as we view it, fixes the time as the date of the default, and does not, as does the charge, leave plaintiffs at liberty to pursue any course, regardless of consequences, after the failure to furnish cars, and charge the defendants up with the consequences until such time as the plaintiffs, perchance, have something to induce *him* to action. Such rule puts defendants at the mercy of plaintiffs who may make the damage what they will, regardless of the idea of compensation for the wrongful acts of the defendants.

Wherefore your petitioners pray that this Honorable Court will grant its writ of error to the said Court of Civil Appeals of the Second Supreme Judicial District to the end that said cause may be brought before this Court and said errors reviewed and corrected, and your petitioners also pray for all such other relief as they may be entitled to.

Your petitioners further state that Messrs. Scott and Dunn, a firm of lawyers residing at Roswell, in the Territory of New Mexico, and J. A. Templeton, an attorney at law residing at Forth Worth, in Tarrant County, State of Texas, are the attorneys of record for the appellees, upon whom notice may be served. Said appellee, Geo. W. Littlefield resides at Austin in Travis County, Texas, and said appellees, J. P. White and Thomas D. White, reside in Chaves County, in the Territory of New Mexico. Said appellees were the plaintiffs in this cause in the trial court suing as the Littlefield Cattle Company, they were the appellees in the Court of Civil Appeals and are the respondents, and all of the respondents to this application.

TERRY, CAVIN & MILLS,
MADDEN, TRULOVE & KIMBROUGH,
Attorneys for the Petitioners, The Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka & Santa Fe Railway Company.

443 Endorsed: App. No. 7245. 1. Error to overrule an assignment complaining of refusal to give special charge going to real merits of case on phase not covered by court's charge, on the ground that the requested charge was "a little too favorable to defendant." 2. Error to overrule an assignment going to real merits of case, complaining of refusal to give special charge on phase of case not covered by court's charge, on the ground that the requested charge was "a little too broad." No. — Granted. In the Supreme Court of the State of Texas. Eastern Railway Company of New Mexico, The Pecos & Northern Railway Company, Southern Kansas Railway Company of Texas, and Atchison, Topeka & Santa Fe Railway Company, Petitioners, vs. George W. Littlefield, J. P. White and Thomas D. White, Respondents. From Deaf Smith County. Petition for Writ of Error. Filed in Supreme Court April 20, 1911. F. T. Connerly, Clerk. Terry, Cavin & Mills, and Madden, Trulove & Kimbrough, Attorneys for Petitioners. By D. B. Trammel, Jr., Deputy. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas April 15, 1911. J. A. Scott, Clerk.

444 *Order Granting Application for Writ of Error.*

App. No. 7245.

EASTERN RY. CO. OF NEW MEXICO et al.
vs.
GEO. W. LITTLEFIELD et al.

From Deaf Smith Co., 2nd Dist.

May 3, 1911.

This day came on to be heard the application of Eastern Ry. Co. of N. M., et al. for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that said application be granted and the writ of error issue as prayed for.

Citation.

Issued December 12, 1912.

The State of Texas to the Sheriff or any Constable of Tarrant County, Greeting:

You are hereby commanded, by delivering to Geo. W. Littlefield, J. P. White and Thomas D. White if found in your County, or to J. A. Templeton and Scott & Dunn, attorneys of record, the accompanying certified copy of this writ, to summons said Geo. W. Littlefield, et al. to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Wednes-

day, the 15th day of January, 1913, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on the first Wednesday next ensuing, ten days after such service, pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Second Supreme Judicial District, and issued on the 12th day of December 1912, wherein Eastern Railway Company of New Mexico, et al., are plaintiffs in error, and you are defendants in error, to show
445 cause, if any there be, why the judgment rendered against the said plaintiff- in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ, with your action endorsed thereon, make due return within ten days from the date hereof.

Witness, the Hon. T. J. Brown, Chief Justice of the Supreme Court of Texas, the 12th day of December in the year of our Lord one thousand nine hundred and twelve.

F. T. CONNERLY, *Clerk.*
By J. S. MYRICK, *Deputy.*

I hereby certify, That the above is a true and correct copy of the original.

[SEAL.]

F. T. CONNERLY,
Clerk of the Supreme Court of Tex.,
By J. S. MYRICK, *Deputy.*

Endorsed: In Supreme Court. Eastern Ry. Co. of New Mexico, et al. vs. Geo. W. Littlefield, et al. Citation. Issued December 12th, 1912. F. T. Connerly, Clerk, Supreme Court, by J. S. Myrick, Deputy. Certified Copy. Came to hand Dec. 13, 1912, and executed Dec. 14th, 1912, by delivering to J. A. Templeton, attorney of record at his office in Fort Worth, Tarrant Co., Texas. W. M. Rea, Sheriff, Tarrant Co., Texas, by R. M. Thompson, Deputy. Fees 75¢, Mileage 25¢; Total $1.00.

Order of Submission.

No. 2274.

EASTERN RY. CO. OF NEW MEXICO et al.
vs.
GEORGE W. LITTLEFIELD et al.

(From Deaf Smith Co., 2nd Dist.)

January 15, 1913.

Submitted upon briefs and orally for both parties.

446 *Opinion.*

Filed March 19, 1913.

No. 2274.

EASTERN RAILWAY COMPANY OF NEW MEXICO et al., Plaintiffs in Error,

vs.

GEORGE W. LITTLEFIELD et al., Defendants in Error.

(From Deaf Smith County, Second District.)

The Court of Civil Appeals made no statement of the character of this case, nor findings of fact, as required by law, and, in order to get a knowledge of the issues involved, we have been compelled to examine the transcript.

The petition alleged that defendants in error constituted a co-partnership under the name of the Littlefield Cattle Company. Littlefield is a citizen of Texas, and his co-partners, J. P. and T. D. White, are citizens of New Mexico, and the business of raising and shipping cattle was conducted on their ranches in Texas and New Mexico.

The plaintiffs in error are the Eastern Railway Company of New Mexico, chartered and organized under the laws of that State, (then territory) and its principal office and officers in Amarillo, Potter County, Texas. The Pecos & Northern Texas Railway Company, who organized under the laws of Texas; The Southern Kansas Railway Company was duly incorporated under the laws of Texas; The Atchison, Topeka & Santa Fe Railway Company was organized under the laws of Missouri and Kansas. It is alleged that each of said corporations has and maintains its principal office at Amarillo, Texas, except the last named, which has a division office at Amarillo. It was alleged that the railroad corporations constituted a partnership, alleging a course of business, as facts, showing the co-partnership.

The petition was filed in the District Court of Deaf Smith County and service had upon the agent of the company in that county.

447 The petition alleged, in substance, that the Littlefield Cattle Company desired to ship a large number of cattle from its ranches in Texas and Mexico to Kansas City, or St. Joe, Missouri, and called upon the agents of the defendants at Kenna and Bovina, in New Mexico, to provide two hundred cars at said places on different days designated, which said agents agreed to do. That relying upon the promise the Cattle Company drove a large number of cattle from the ranch in Texas to Kenna in New Mexico, but the railroad failed to furnish the cars and the Cattle Company after holding the cattle there from the 9th day of September, 1907, until the 18th day of October, 1907, was compelled to abandon the shipment of the cattle and drove them back to the ranch in Texas, alleging damages in a large sum.

The defendants pleaded to the jurisdiction of the district court and each stated the county in which it claimed the privilege to be sued in Texas. The pleas were submitted with the case to the jury, to which defendants excepted, claiming the right to try the pleas to jurisdiction before the trial of the case. The foregoing statement will be sufficient for this investigation.

The Court of Civil Appeals said in the opinion: "Those assignments complaining of the court's action with reference to pleas of privilege interposed by some of the appellants are disposed of in our conclusion that the undisputed evidence is such as to show that all the appellants were partners and agents of each other and had a common agent in Deaf Smith County in such manner as to make them all subject to the jurisdiction of the District Court of that county."

The defendants filed answers raising the questions of law.

The first ground of error set up in the application of the railroad companies is to the effect that the district court erred in refusing to submit to the jury their plea to the jurisdiction of the court before the trial of the case on the merits.

448 It was in the discretion of the trial court to submit the plea before or at the trial on the merits, and, as no injury is shown to have resulted, the judgment will not be disturbed by this court for that reason. Pryor v. Jolly, 91 Tex. 89; Tynburg v. Cohen, 67 Tex. 224.

The second and third grounds are not presented in compliance with the rules of court and will not be considered. This court granted the application for probable error in refusing this charge:

"If the jury find for the plaintiffs and also find and believe from the evidence that any of the cattle driven to or near Kenna were owned by Littlefield, the Whites and one Wilkerson, at the time they were so driven, and not by Geo. W. Littlefield, J. P. White and T. D. White, alone, you will not consider in estimating the amount of damages to be awarded any such cattle as may have been then partly owned by Wilkerson, but consider only those owned exclusively by plaintiffs; and in this connection you are charged that the fact that Wilkerson may have owed for the purchase price of such cattle, or his interest therein, will not destroy his rights therein at that time and you will not consider such fact."

The evidence shows that the cattle referred to in the charge were in the possession and control of the defendants in error, which placed them in the attitude of bailees of the cattle, who, having the right to ship and sell them, can recover damages to such cattle which was caused by the breach of the contract of shipment. Masterson v. I. & G. N. Ry. Co., 55 S. W. 577.

By their fifth assignment the plaintiffs in error complain of the refusal by the court to give to the jury this charge:

"If you believe and find from the evidence that the plaintiffs or their employees in charge of said cattle which were held at Kenna for shipment were guilty of negligence in bringing said

449 cattle into said station at the time the same were brought there, or in holding said cattle near said station while waiting for cars wherein to ship same, and if you further find and be-

lieve from the evidence that said cattle were injured or damaged as a result of such negligence, they you are instructed that plaintiffs cannot recover such damages, if any, as you find resulted from their own negligence, or that of their employees. And any and all injuries or damages so sustained by said cattle through the fault and neglect of the plaintiffs, are not recoverable in this suit and should be excluded from your consideration in assessing the damage, if any, which plaintiffs are entitled to recover."

In the tenth subdivision of the court's charge that issue was submitted to the jury in better form than the charge asked:

"10. If you believe and find from the evidence that the plaintiffs or their employes in charge of said cattle which were held at Kenna for shipment were guilty of negligence in bringing said cattle into said station at the time the same were brought there, or in holding said cattle near said station while waiting for cars wherein to ship same, and if you further find and believe from the evidence that said cattle were injured or damaged as a result of such negligence, then you are instructed that plaintiffs can not recover such damage, if any, as you find resulted from their own negligence, or that of their employes. Any and all injuries or damages so sustained by said cattle through the fault and neglect of the plaintiffs, are not recoverable in this suit and should be excluded from your consideration in assessing the damage, if any, which plaintiffs are entitled to recover."

The charge given submits, in substance, the issue presented by defendants' charge which was refused.

The Cattle Company drove the cattle from the ranch to
450 Kenna because they had the legal right to expect the cars to be furnished on the 15th day of September, and if it was proper to have them at the place six days before the time for shipment, then there was no negligence in the act of having them at the place awaiting the arrival of the cars; and the cattle being at that place in compliance with the implied contract, the failure to furnish the cars was the cause of the expense in holding the cattle before as well as after the day when the cars should have been furnished. The expense was incurred by acting upon the legal obligation of the railroads to furnish the cars, and the failure to furnish the transportation caused the expense to be a loss to the cattle company. If the cars had been furnished at the time agreed upon the cost of holding the cattle might have been recovered in their sale in the market in better condition, but added nothing to their value at Kenna nor on their return to the ranch. It was a loss caused by the failure to furnish the cars.

The eighth assignment presents no issue in such form as would enable this court to decide it, and the ninth assignment is of like character; they will not be considered. The tenth ground of error is without merit; the charge correctly stated the rule of law on the measure of damages under the facts proved.

The charge of the district court deserves commendation for its comprehensive and clear presentation of the issues in this case.

We find no reversible error in the proceedings and the judgment is affirmed.

T. J. BROWN,
Chief Justice.

Endorsed: No. 2274. Eastern Railyway Co. of New Mexico, et al. vs. Geo. W. Littlefield, et al. Opinion. Judgments Affirmed. Filed in the Supreme Court, March 19, 1913. F. T. Connerly, Clerk. Mr. Chief Justice Brown.

451 *Judgment.*

Entered March 19, 1913.

No. 2274.

EASTERN RY. CO. OF NEW MEXICO et al.
vs.
GEORGE W. LITTLEFIELD et al.

From Deaf Smith Co., 2nd District.

Opinion delivered by Chief Justice Brown.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Second Supreme Judicial District and the original transcript in said cause being before the Court as well as the transcript showing the proceedings had in said Court of Civil Appeals and these having been duly considered, because it is the opinion of this Court that there was no error in the Judgment of the Court of Civil Appeals and District Court, it is therefore considered, adjudged and ordered that said Judgment be affirmed: That the Defendants in error Geo. W. Littlefield, J. P. White and Thomas D. White do have and recover of and from the plaintiffs in error Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, the Southern Kansas Railway Company of Texas and Atchison, Topeka & Santa Fe Railway Company and their Sureties Chas. A. Fisk, Ray Wheatley and J. N. Freeman the amount adjudged in the District Court, together with all costs in this behalf expended in this Court and in the Court of Civil Appeals and this decision be certified to the District Court for observance.

452 In the Supreme Court of the State of Texas.

No. 2274.

EASTERN RAILWAY CO. OF NEW MEXICO et al., Plaintiffs in Error,
vs.
GEORGE W. LITTLEFIELD et al., Defendants in Error.

Motion for Rehearing.

To the Honorable Supreme Court of the State of Texas:

Now come Plaintiffs in Error and move this Honorable Court to set aside the judgment of affirmance rendered in the above num-

bered and entitled cause in this Court on the 19th day of March, 1913, and on such rehearing to reverse the judgment of the Court of Civil Appeals and of the trial court, and to dismiss the cause, or render judgment for plaintiff in error, or remand, as the law and the facts may require. As grounds for such motion plaintiffs in error set up the following, to wit:

I.

The District Court of Deaf Smith County, Texas, originally, and the Court of Civil Appeals and this Court, as appellate courts, are without jurisdiction or power to hear and determine the matters in controversy in this cause, but the courts of the United States alone and exclusively have such jurisdiction under the Federal statutes, known as the Interstate Commerce Law, or the Hepburn Act, and acts amendatory thereof, for this:

1. It appears from plaintiffs' petition (beginning with the sixteenth line from the top on transcript page 2, and reading to the end of the 9th line from top on page 3), from the statement of
453 facts (beginning with the first line on page 1 and reading to the middle line on page 5), and from the findings of this Court, as recited in the opinion filed herein, that the Eastern Railway Company is a corporation incorporated under the laws of New Mexico, owning and operating a line of railroad from Kenna in New Mexico to the New Mexico-Texas state line at Texico; that the Pecos & Northern Texas Railway Co. is a corporation, incorporated under the laws of Texas, owning and operating a line of railroad from a junction with that of the Eastern Railway Company at Texico to Amarillo, Texas; that the Southern Kansas Railway Company of Texas is a corporation incorporated under the laws of Texas, owning and operating a line of railroad extending from a junction with the line of the Pecos & Northern Texas Railway Company at Amarillo, Texas, to the Texas-Oklahoma state line near Higgins, Texas; that the Atchison, Topeka & Santa Fe Railway Company is a corporation incorporated under the laws of Kansas, owning and operating a line of road extending from a junction with that of the Southern Kansas Company at the Texas-Oklahoma state line, near Higgins, Texas, through Oklahoma and Kansas to St. Joseph and Kansas City; that said companies' several lines thus connected form a through route or line from Kenna to St. Joseph and Kansas City; and that at the time of the alleged failure to furnish cars, in this suit complained of, each and all of defendants were engaged in interstate commerce, i. e. carrying freights over such lines en route, interstate.

2. The request or order to furnish cars was for cars to be loaded with cattle at Kenna, and to move from thence over said lines en route, interstate to St. Joseph or Kansas City. (Tr., p. 5, beginning with the word "Second," near middle of page and reading to the end of thirteenth line from bottom on page 7.)

454–469 3. Prior to the enactment of the law as now recited in section 1 of the Interstate Commerce Law, popularly known as the Hepburn Bill, the common law imposed upon carriers

the obligation to receive and carry goods tendered to it for transportation over its own lines, even though marked for a destination beyond its line, but it was not compelled to carry, or to furnish cars to carry, beyond the terminus of its own line. (Railway vs. Inmon, 14 T. C. A., 34, 47; Railway vs. Baird, 75 Tex., 256; Railway vs. Railway Co., 110 U. S., 667; United States vs. Geddes, 13 Fed. Rept., 452, 458; Hutchinson on Carriers, 2nd Ed., Sec. 115.)

* * * * * * *

470 XI.

This Court erred in overruling the Eighth Ground of Error, presented on pages 39 to 43 in the Petition for Writ of Error, and as well, erred in that part of the opinion which says, "The Eighth Assignment presentes no issue in such form as would enable this Court to decide it, and the Ninth Assignment is of like character; they will not be considered."

We apprehend, as in the case of the Second and Third Grounds of Error hereinbefore discussed, that this Court applied the rules as amended and going into effect January 24, 1912, rather than the rule as existing at the time the petition was filed. And for reasons shown hereinbefore, we suggest that this Court should now consider the questions presented by the Eighth Assignment of Error. In fact, the principal question thereby raised is a question of jurisdiction. Such question can always be raised, and it needs only a suggestion to require of courts the consideration thereof. This question is fully presented under division 1 of this motion, and will not be here repeated.

* * * * * * *

471 *Conclusion.*

Plaintiffs in Error especially show that one of the Defendants in Error, Geo. W. Littlefield, resides in Travis County, Texas, and that J. A. Templeton, who resides at Fort Worth, in Tarrant County, Texas, is an attorney of record for Defendants in Error, and service hereof can be had upon him. Other counsel for Defendants in Error reside at Roswell, New Mexico, beyond the jurisdiction of that Court.

Wherefore, Plaintiffs in Error respectfully submit the several grounds for this motion, and pray the judgment and order of this Court, reversing the judgment of the trial court and the Court
472 of Civil Appeals, and dismissing the suit, or rendering judgment for Plaintiffs in Error, or remanding the cause, as the law and the facts may require.

Respectfully submitted,

By TERRY, CAVIN & MILLS,
Of Galveston, Texas, and
MADDEN, TRULOVE & KIMBROUGH,
Of Amarillo, Texas,
Attorneys for Plaintiffs in Error.

Endorsed: Mo. No. 2925. No. 2274. In the Supreme Court of Texas. Eastern Ry. Co. of New Mexico, et al. *vs.* Plaintiffs in Error, vs. Geo. W. Littlefield, et al., Defendants in Error. Submitted April 16, 1913. Motion for Rehearing. Filed in Supreme Court April 3rd, 1913. F. T. Connerly, Clerk. By J. S. Myrick, Deputy. Overruled May 21, 1913. Precept & Copy issued April 4, 1913.

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473 *Order Overruling Motion for Rehearing.*

Entered May 21, 1913.

Mo. No. 2925. No. 2274.

EASTERN RAILWAY COMPANY OF NEW MEXICO et al.
vs.
GEO. W. LITTLEFIELD et al.

(From Deaf Smith Co., 2nd Dist.)

This day came on to be heard the motion of the plaintiffs in error for a rehearing, and said motion having been duly considered it is ordered that the same be and is hereby overruled: that the plaintiffs in error Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and Atchison, Topeka & Santa Fe Railway Company & their sureties, Chas. A. Fisk, Ray Wheatley and J. N. Freeman, pay all costs incurred on this motion.

474 *Order Withholding Issuance of Mandate for Sixty Days.*

Filed June 12, 1913.

No. 2274.

EASTERN RAILWAY COMPANY OF NEW MEXICO et al., Plaintiffs in Error,
vs.
GEO. W. LITTLEFIELD et al., Defendants in Error.

(From Deaf Smith County, 2nd Dist.)

It is ordered that the issuance of the mandate, in the above styled and numbered cause, be withheld for the period of sixty days from date.

Austin, Texas, June 12th, 1913.

T. J. BROWN,
Chief Justice of the Supreme Court of Texas.

Indorsed: No. 2274. Eastern Railway Co. of New Mexico, et al. vs. Geo. W. Littlefield, et al. Order withholding issuance of mandate for sixty days. Filed in the Supreme Court of Texas June 12, 1913. F. T. Connerly, Clerk.

475 *Petition for Allowance of Writ of Error.*

Filed November 4th, 1913.

THE EASTERN RAILWAY COMPANY OF NEW MEXICO et al., Plaintiffs in Error,
vs.
GEORGE W. LITTLEFIELD et al., Defendants in Error.

Petition for Allowance of Writ of Error.

To the Honorable the Supreme Court of the United States:

Comes now The Eastern Railway Company of New Mexico, The Pecos and Northern Texas Railway Company, The Southern Kansas Railway Company of Texas and The Atchison, Topeka and Santa Fe Railway Company, by their attorneys, J. W. Terry, Gardiner Lethrop, A. B. Browne and A. H. Culwell, and complain that in the record and proceedings as also in the rendition of a judgment in a suit between The Eastern Railway Company of New Mexico, The Pecos and Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, The Atchison, Topeka and Santa Fe Railway Company and George W. Littlefield, J. P. White and Thomas D. White, composing the firm of Littlefield Cattle Company, in the Supreme Court of the State of Texas, being the highest court of law or equity in said State to which the said plaintiffs in error could appeal and obtain a decision on the merits involved in said cause, and same being the court which has the final custody of the record in said cause, and in which a final judgment was rendered against the said plaintiffs in error by the said Supreme Court of the State of Texas on the 19th day of March, 1913, and in which plaintiffs in error's motion for rehearing was overruled by said Court on the 21st day of May, 1913;

That in said cause a right, title, privilege or immunity is claimed under a statute of the United States and an authority exercised under the United States, to-wit, under the Act of June 29th, 1906,
476 being an act to amend an act entitled "An Act to regulate commerce approved February 4th, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and the decision was against the right, title, privilege or immunity specially set up or claimed under such statute and under an authority exercised under the United States, and the Supreme Court of the State of Texas having imposed and awarded judgment against plaintiffs in error in the sum of Eleven Thousand and Fifteen Dollars and Fifty-five cents ($11,015.55), besides costs of suit, and

which said judgment is now a final judgment, and from which there is no appeal to any other court or courts within the State of Texas;

That plaintiffs in error pleaded in that court, as well as in the Court of Civil Appeals for the 2nd Supreme Judicial District of Texas, to which court an appeal in this cause was originally prosecuted from the judgment as above which had been rendered in the District Court of Deaf Smith County, Texas, the right, privilege or immunity claimed under such statute of the United States, to-wit, the act above specified, in that under the facts of this case as plead and proven, there was no jurisdiction in the State courts to render any judgment or decree therein, but that the exclusive jurisdiction to hear and determine the complaint was vested in the Circuit Court (now District Court) of the United States or in the Interstate Commerce Commission, and that the subject matter in dispute was outside of and beyond the jurisdiction of any State Court to hear and determine, which plea so presented in the said Supreme Court of the State of Texas, as well as in the Court of Civil Appeals above named, was by said courts and each of them overruled, and said courts assumed jurisdiction to hear and determine this cause of action and denied to these plaintiffs in error the right, privilege and immunity so claimed and set up by them, and your petitioners here represent that there was no jurisdiction in the State courts to hear, try and determine this cause of action; that the same is and was regulated wholly and exclusively by the act regulating commerce above referred
477 to, and that there is here drawn in question the validity of the judgment entered herein, and of the power of the State courts to hear and determine the cause of action declared upon, as under said act regulating Interstate commerce, and being the act of June 29th, 1906, exclusive jurisdiction to hear and determine the cause of action herein declared upon and determined by the State courts is and was vested in a Circuit Court (now District Court) of the United States or the Interstate Commerce Commission and the decision of the State courts above mentioned was against the right, privilege or immunity set up and claimed therein, all of which appears in the record and proceedings in said suit; manifest error hath happened to the great damage of these petitioner-.

Wherefore, said The Eastern Railway Company of New Mexico, The Pecos and Northern Texas Railway Company, The Southern Kansas Railway Company of Texas and The Atchison, Topeka and Santa Fe Railway Company, by their attorneys, pray for allowance of a writ of error, and all such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE,
A. H. CULWELL,

Attorneys for The Eastern Railway Company of New Mexico, The Pecos and Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka and Santa Fe Railway Company.

Allowed by:

——— ———,

Associate Justice Supreme Court
of the United States.

Endorsed: Eastern Ry. Co. of New Mex. et al., Plaintiffs in error, vs. Geo. W. Littlefield et al. Petition for Allowance of Writ of Error. Filed in Supreme Court of Texas this November 4th, 1913. F. T. Connerly, Clerk.

478 *Bond on Writ of Error.*

Filed Nov. 4, 1913.

Know all men by these presents, That we, The Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka and Santa Fe Railway Company, as principals, and National Surety Company, as sureties, are held and firmly bound unto George W. Littlefield and the Littlefield Cattle Company, in the full and just sum of Five Hundred and 00/100 dollars, to be paid to the said George W. Littlefield, and the Littlefield Cattle Company, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-first day of October, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the Supreme Court of the State of Texas in a suit depending in said Court, between said George W. Littlefield and the Littlefield Cattle Company, plaintiffs, and The Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka and Santa Fe Railway Company a judgment was rendered against the said The Eastern Railway Company of New Mexico, The Pecos and Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka and Santa Fe Railway Company and the said The Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Comapny of Texas, and The Atchison, Topeka and Santa Fe Railway Company having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George W. Littlefield and the Littlefield Cattle Company citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

479 Now, the condition of the above obligation is such, That if the said The Eastern Railway Company of New Mexico, The Pecos and Northern Texas Railway Company, The Southern

Kansas Railway Company of Texas, and The Atchison, Topeka an Santa Fe Railway Company shall prosecute their writ of error t effect, and answer all damages and costs if they fail to make thei plea good, then the above obligation to be void; else to remain i full force and virtue.

THE EASTERN RAILWAY COMPANY OF NEW MEXICO,
By E. P. RIPLEY, *Its President.* [SEAL.]
THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY,
By E. P. RIPLEY, *Its President.* [SEAL.]
THE SOUTHERN KANSAS RAILWAY COMPANY OF TEXAS,
By E. P. RIPLEY, *Its President.* [SEAL.]
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By E. P. RIPLEY, *Its President.* [SEAL.]
NATIONAL SURETY COMPANY.
W. HERBERT STEWART,
Attorney in Fact.

Sealed and delivered in presence of—
L. C. DEMING.
D. L. GALLUP.
WALTER ELY.

Approved by—
WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

480 Know all men by these presents, that the National Suret Company, a New York corporation, having its principal offi in the City, County and State of New York, doth hereby make, co stitute and appoint W. Herbert Stewart of Chicago, of the State Illinois, its true and lawful attorney in Fact, with full power an authority to sign, execute, acknowledge and deliver in its nam place and stead, as surety, bonds, undertakings and writings oblig tory in the nature thereof, and when said bonds, undertakings an writings obligatory are signed by the said W. Herbert Stewart such Attorney in Fact to bind the Company as fully and to th same extent as if the same were signed by the President of the Co pany, sealed with its common seal, and duly attested by its Secr tary; and the said Company hereby ratifies and confirms all th acts of the said Attorney in Fact done pursuant to the power an authority herein given.

This power of attorney is made and executed in accordance wit and by authority of a certain By-law adopted by the Board Directors of the National Surety Company at a meeting duly calle and held on the second day of February, 1909, which reads as fo lows:

"Article XII. Resident Officers and Attorneys in Fact.

"SECTION 1. The president, First Vice-President or any other Vice-President may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Company, and either the President, First Vice-President, or any other Vice-President, the Board of Directors or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and authority given him.

"SECTION 4. Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute for and in the name and on behalf of the company, any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature of a bond, recognizance or conditional undertaking, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary."

And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March, A. D. 1912, a quorum being present, the following additional section to the foregoing By-Law was adopted:

481 "SECTION 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, policies of insurance and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any By-Law contained in Articles VI, XII and XIII of the By-Laws of the Company."

In witness whereof, the National Surety Company, has caused these presents to be signed by its 1st Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 1st day of April, A. D. 1913.

NATIONAL SURETY COMPANY,
By WILLIAM J. GRIFFIN,
1st Vice-President.

[Corporate Seal.]

Attest:

WM. I. HAWKS,
Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 1st day of April, A. D. 1913, before me personally came William J. Griffin to me known, who being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the 1st Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by

order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[NOTARIAL SEAL.] ETTA B. GEWECKE,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

I, Wm. I. Hawks, Assistant Secretary of the National Surety Company do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney executed by said National Surety Company which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 8th day of April, A. D. 1913.

WM. I. HAWKS,
Assistant Secretary.

(Endorsed:) The Eastern Ry. Co., of New Mexico et al., Pl'ffs in Error, vs. Geo. W. Littlefield et al., Def'ts in Error. Bond.—On Writ of Error. Filed in the Supreme Court of Texas the 4th of November, 1913. F. T. Connerly, Clerk.

482 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka & Santa Fe Railway Company, plaintiffs in error, and George W. Littlefield, J. P. White, and Thomas D. White, composing the firm of Littlefield Cattle Company, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;
or wherein was drawn in question the construction of a
483 clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiffs in error as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand nine hundred and thirteen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by
WILLIS VAN DEVANTER,
Associate Justice of the Supreme
Court of the United States.

Filed in Supreme Court of Texas, November 4, 1913. F. T. Connerly, Clerk.

484 UNITED STATES OF AMERICA, *ss:*

To George W. Littlefield, J. P. White, and Thomas D. White, composing the firm of Littlefield Cattle Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Texas, wherein The Eastern Railway Company of New Mexico, The Pecos & Northern Texas Railway Company, The Southern Kansas Railway Company of Texas, and The Atchison, Topeka & Santa Fe Railway Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this twenty-ninth day of October, in the year of our Lord one thousand nine hundred and thirteen.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court
of the United States.

On this 7th day of November, in the year of our Lord one thousand nine hundred and thirteen, personally appeared before me, the

subscriber, D. A. Campbell, Deputy United States Marshal, for t
Northern District of Texas and makes oath that he delivered a tr
copy of the within citation to J. A. Templeton, at Forth Wor
Texas, on the 7th day of November, 1913, as Attorney of Reco
for Defendant in Error.

D. A. CAMPBELL,
Deputy United States Marshal,
Northern District of Texas.

Sworn to and subscribed the 7th day of November, A. D. 1913.

[Seal Notary Public, County of Tarrant, Texas.]

GEO. W. WHITEHILL,
Notary Public, Tarrant County, Texas.

[Endorsed:] Marshal's Docket No. 3149. Eastern Ry. Co.
New Mexico et al. vs. Geo. W. Littlefield et al. Citation. (Origina
Filed in Supreme Court of Texas the 15th of November, 191
F. T. Connerly, Clerk.

485 *Assignments of Error.*

Filed November 4th, 1913.

No. —.

THE EASTERN RAILWAY COMPANY OF NEW MEXICO et al., Plainti
in Error,
vs.
GEORGE W. LITTLEFIELD et al., Defendants in Error.

In Error from the Supreme Court of the State of Texas.

To the Supreme Court of the United States:

Comes now The Eastern Railway Company of New Mexico, T
Pecos and Northern Texas Railway Company, The Southern Kans
Railway Company of Texas and The Atchison, Topeka and San
Fe Railway Company, plaintiffs in error, by their Attorneys, J.
Terry, Gardiner Lathrop, A. B. Browne and A. H. Culwell, a
say that in the record and proceedings aforesaid there is manif
error in the judgment and decision of the Supreme Court of t
State of Texas, to-wit:

First. The Supreme Court of the State of Texas erred in ov
ruling and failing to sustain the Eighth ground of error set up
that court and paragraph (*b*) thereof, which was as follows:

"(*b*) The facts show that the court is without jurisdiction ov
the subject matter in controversy herein, in that it shows that t
four defendants are four distinct corporations, owning four distin
lines of road, each located in separate states and territories, and th
they are not partners.

"The third proposition under said assignment reads as follows:

" 'The Circuit Court of the United States has exclusive jurisdiction over the matter in controversy herein to the exclusion of state courts and the court at the conclusion of the testimony should have peremptorily dismissed this cause for want of jurisdiction, or submitted the issue of joint liability on account of the allegation of partnership and agency to the jury for their determination as a basis for determining the jurisdiction of the court.' "

486 Second. The Supreme Court of the State of Texas erred in assuming jurisdiction and rendering judgment herein in favor of the defendants in error and in failing to sustain the proposition presented by plaintiffs in error in that court to the effect that the Circuit Court (now District Court) of the United States has exclusive jurisdiction over the subject matter in controversy to the exclusion of the state courts.

Third. The Supreme Court of the State of Texas erred in affirming the judgment rendered herein in the District Court of Deaf Smith County, which had been affirmed by the Court of Civil Appeals for the 2nd Supreme Judicial District for the reason that under the provisions of the Act of June 29th, 1906, same being an act to amend an act entitled "An Act to Regulate Commerce, approved February 4th, 1887, and all acts amendatory thereof and to enlarge the powers of Interstate Commerce Commission," there was and is no jurisdiction in the state courts to grant the relief asked for in plaintiff's petition filed herein, nor under the evidence adduced on the trial. That under the complaint filed herein and evidence adduced the state courts were without jurisdiction to grant any relief as under the act to regulate interstate commerce above specified, the exclusive jurisdiction to hear and determine complaints and render judgments on causes of action, such as are herein declared upon, is vested exclusively in the Circuit Court (now District Court) of the United States and the Interstate Commerce Commission, and there was and is no power in the state courts to render the judgment that has herein been affirmed.

Fourth. As the subject matter of the litigation herein is within the terms of and is regulated by the Interstate Commerce act under which state courts are without jurisdiction to hear and determine such complaints, the judgment of the Supreme Court of Texas, whereby is affirmed a judgment against your petitioners, is a denial to them of a title, right, privilege or immunity claimed under a statute of the United States, and the Supreme Court of Texas erred in not sustaining the proposition presented by plaintiffs in

487 error to this effect.

Fifth. The Supreme Court of the State of Texas erred in holding that a portion of the damages sued for were recoverable on the ground of the express contract and undertaking of the defendants because such contract or undertaking would be and is invalid and contrary to the provisions of the Federal interstate commerce law.

Respectfully submitted,

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE,
A. H. CULWELL,
Attorneys for Plaintiffs in Error.

Endorsed: Eastern Ry. Co. of New Mex. et al., Pl'ffs in Error, vs. Geo. W. Littlefield et al., Assignments of Error. Filed in Supreme Court of Texas, this November 4, 1913. F. T. Connerly, Clerk.

488–517 Clerk's Office, Supreme Court of Texas.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the foregoing Four Hundred and Eighty-seven pages (except pages numbered 582, 583 and 584) contain a true and correct copy of all the proceedings had in the District Court of Deaf Smith County, Texas; in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, and in the Supreme Court of Texas, as the same appear of record and on file in this office in cause No. 2274, Entitled, The Eastern Railway Company of New Mexico, et al., Plaintiffs in Error, vs. George W. Littlefield, et al., Defendants in Error.

I further certify that the pages herein 582 and 583, is the original Writ of Error, of which a copy has been lodged and is now on file in this office, and that the page herein numbered 584, is the original Citation in Error, a copy of which is now on file in this office.

In testimony whereof, I hereto sign my name and affix the seal of the Supreme Court of Texas, at the City of Austin, this the 18th day of November A. D. 1913.

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

NOTE.—It being impossible to copy the "Exhibits" referred to in the foregoing proceedings, I have attached hereto the original exhibits sent up to this court with the original statement of facts from the District Court of Deaf Smith county, Texas.

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

518 In the Supreme Court of the United States, October Term.

No. 839.

EASTERN RAILWAY COMPANY OF NEW MEXICO et al., Plaintiff- in Error.

vs.

GEORGE W. LITTLEFIELD et al., Defendant- in Error.

Comes now the Eastern Railway Company of New Mexico, The Pecos and Northern Texas Railway Company, Southern Kansas Railway Company of Texas and The Atchison, Topeka and Santa Fe Railway Company, plaintiffs in error, by their Attorneys, J. W. Terry, Gardiner Lathrop, A. B. Browne and A. H. Culwell, and represent that on the hearing of the above entitled and numbered cause, and in accordance with paragraph 9 Rule X of this Court, and file a statement of the errors on which they intend to rely, as follows:

"First. The Supreme Court of the State of Texas erred in overruling and failing to sustain the Eighth Ground of error set up in that court and paragraph (*b*) thereof, which was as follows:

"'(*b*) The facts show that the court is without jurisdiction over the subject matter in controversy herein, in that it shows that the four defendants are four distinct corporations, owning four distinct lines of road, each located in separate states and territories, and that they are not partners.

"The third proposition under said assignment reads as follows:

"'The Circuit Court of the United States has exclusive jurisdiction over the matter in controversy herein to the exclusion of state courts and the court at the conclusion of the testimony should have peremptorily dismissed this cause for want of jurisdiction, or submitted the issue of joint liability on account of the allegation of partnership and agency to the jury for their determination as a basis for determining the jurisdiction of the court.'"

"Second. The Supreme Court of the State of Texas erred
519 in assuming jurisdiction and rendering judgment herein in favor of the defendants in error and in failing to sustain the proposition presented by plaintiffs in error, in that court to the effect that the Circuit Court (now District Court) of the United States has exclusive jurisdiction over the subject matter in controversy to the exclusion of the state courts.

"Third. The Supreme Court of the State of Texas erred in affirming the judgment rendered herein in the District Court of Deaf Smith County, which had been affirmed by the Court of Civil Appeals for the 2nd Supreme Judicial District for the reason that under the provisions of the Act of June 29th, 1906, same being an act to amend an act entitled 'An Act to regulate commerce, approved February 4th, 1887, and all acts amendatory thereof and to enlarge the powers of Interstate Commerce Commission,' there was and is no jurisdiction in the state courts to grant the relief asked for in plaintiffs' petition filed herein, nor under the evidence adduced on the trial. That under the complaint filed herein and evidence adduced the state courts were without jurisdiction to grant any relief as under the act to regulate interstate commerce above specified, the exclusive jurisdiction to hear and determine complaints and render judgments on causes of action, such as are herein declared upon, is vested exclusively in the Circuit Court (now District Court) of the United States and the Interstate Commerce Commission, and there was and is no power in the state courts to render the judgment that has herein been affirmed.

"Fourth. As the subject matter of the litigation herein is within the terms of and is regulated by the Interstate Commerce act under which state courts are without jurisdiction to hear and determine such complaints, the judgment of the Supreme Court of Texas, whereby is affirmed a judgment against your petitioners, is a denial to them of a title, right, privilege or immunity claimed under a statute of the United States, and the Supreme Court of Texas erred in not sustaining the proposition presented by plaintiffs in error to this effect."

520 And likewise a statement of the parts of the record, which they think necessary for the consideration thereof, as follows:

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"Original answer of P. & N. T. Ry. Co	23–28
"Answer of E. Ry. Co. of N. M	29–30
"Answer of S. K. Ry. Co. of Texas and A. T. & S. F. Ry. Co.	30–31
"Plaintiff's first supplemental petition	31–33
"Order overruling defendants' exception to jurisdiction and general and special demurrers	35
"Defendants' Bill of Exceptions No. 2	39–40
"Charge of Court	149–15
"Defendants' motion for special issues and charges	156–15
"Special charge No. 1 requested by defendants	158–16
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"Judgment of Court	168–17
"Defendants' amended motion for new trial (Caption Introduction, Second ground and Thirty-seventh ground, *b*, *c*, *d*, and *e*, Conclusion)	170–171, 174–17
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Respectfully submitted,

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE,
A. H. CULWELL,
Attorneys for Plaintiffs in Error.

521 STATE OF TEXAS,
County of Tarrant:

Before me the undersigned authority on this day personally appeared R. T. Hardy, to me well known, and on oath deposes and says:

That at 3:35 P. M. March 14th, 1914, he personally delivered to J. A. Templeton, Attorney of Record for Defendants in Error, copy of designation of errors in Eastern Railway Company of New Mexico, et al., Plaintiff- in Error, vs. George W. Littlefield, et al., Defendant- in Error, the original of which is hereto attached.

R. T. HARDY.

Subscribed and sworn to before me this 14th day of March, A. D. 1914.

[Seal Notary Public, County of Tarrant, Texas.]

W. D. SMITH,
Notary Public in and for Tarrant County, Texas.

522 [Endorsed:] 839/23990. Original. Eastern Railway Company of New Mexico et al., Pl'ffs in Error, vs. Geo. W. Littlefield et al. Designation of Errors Relied on, etc., by Pl'ffs in Error.

523 [Endorsed:] File No. 23,990. Supreme Court U. S., October term, 1913. Term No. 839. The Eastern Railway Company of New Mexico, Pl'ff in Error, vs. George W. Littlefield et al. Statement of errors relied upon and designation by plaintiffs in error of parts of record to be printed, with proof of service of same. Filed March 21, 1914.

Endorsed on cover: File No. 23,990. Texas Supreme Court. Term No. 320. The Eastern Railway Company of New Mexico. The Pecos & Northern Texas Railway Company et al., plaintiffs in error, vs. George W. Littlefield, J. P. White, and Thomas D. White, composing the firm of Littlefield Cattle Company. Filed December 29th, 1913. File No. 23,990.

IN THE

Supreme Court of the United States

October Term, A. D. 1914

No. 320

THE EASTERN RAILWAY COMPANY OF NEW MEXICO, PECOS AND NORTHERN TEXAS RAILWAY COMPANY, ET AL.,

Plaintiffs in Error

vs.

GEORGE W. LITTLEFIELD, J. P. WHITE AND THOMAS D. WHITE, CONSTITUTING THE FIRM OF LITTLEFIELD CATTLE COMPANY,

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

Terry, Cantey & Mills,

A. H. Culp,

Robert Dunlap,

Attorneys for Plaintiffs in Error.

(Address Letters)

Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 320

THE EASTERN RAILWAY COMPANY OF NEW MEXICO, PECOS AND NORTHERN TEXAS RAILWAY COMPANY, ET AL.,

Plaintiffs in Error.

vs.

GEORGE W. LITTLEFIELD, J. P. WHITE AND THOMAS D. WHITE, COMPOSING THE FIRM OF LITTLEFIELD CATTLE COMPANY.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

The defendants in error have presented a motion to dismiss the writ of error granted herein, assigning five reasons therefor, and have submitted brief in support of said motion. The grounds of the motion briefly expressed are: (a) That the record fails to show that some right, privilege or immunity under some statute of the United States was seasonably set up and claimed by plaintiffs in error in the State Court and that such right, privilege or immunity was denied by said court;

(b) That the record shows affirmatively that exclusive jurisdiction to try and determine this cause was not vested in the United States courts to the exclusion of the state courts; (c) That our assignments of error were based upon questions of fact which had been tried and decided against us; (d) That the errors complained of were not presented to and reviewed by the State courts in such way as to confer jurisdiction on this court to review the same; and (e) That the judgment rendered in the State courts is not void for want of jurisdiction.

The record shows that four railway companies were sued as defendants. It was charged in said petitions that The Eastern Railway Company of New Mexico, defendant, was duly incorporated under and by virtue of the laws of New Mexico with its principal office at Amarillo, Texas, The Pecos and Northern Texas Railway Company, incorporated under the laws of the State of Texas having its principal office at Amarillo, Texas, The Southern Kansas Railway Company of Texas, incorporated under the laws of the State of Texas with its principal office at Amarillo, Texas, and The Atchison, Topeka and Santa Fe Railway Company, incorporated under the laws of the State of Missouri and Kansas, with its principal offices located at Topeka, Kansas. (Pr. Rec., 2.)

It is further shown in the petition that the four lines of railway above described constitute a through route from Kenna, New Mexico and Bovina, Texas, to Kansas City, Missouri, and to St. Joe, Missouri; that the line of The Eastern Railway Company of New Mexico extends through the territory of New Mexico from Roswell to Texico on the line of said territory; that the Pecos and Northern Texas Railway extends from Texico through Hereford to Amarillo; that The Southern Kansas Railway Company of Texas extends from Amarillo, Texas,

to Higgins, Oklahoma, and that the line of The Atchison, Topeka and Santa Fe Railway extends from Higgins to Kansas City and St. Joe. (Pr. Rec., 2.)

It is then charged in the petition that The Atchison, Topeka and Santa Fe Railway Company is the parent and dominant corporation controlling its co-defendants, which are mere auxiliary and subordinate corporations under the supervision and control of the parent company and that they all form parts of what is known as the Santa Fe System of railways and were partners. (Pr. Rec., 3.)

As cause of action, it was alleged that in May, 1907, plaintiffs desired to ship a large number of cattle from Bovina and Kenna to St. Joe and Kansas City and made demand on the defendant companies for 200 cars to be furnished in September and October following at the above named stations for the transportation of these cattle from Bovina and Kenna to Kansas City and St. Joe and that relying upon the promise of the defendants to so furnish cars, the cattle were driven to the above named stations, but that the cars were never furnished; that defendants failed to so furnish same and refused to accept the cattle for shipment; that the cattle were held under herd until the 18th day of October, 1907, when plaintiff was forced to abandon the purpose of shipping said cattle during that season and same were returned to the ranch in Texas. (Pr. Rec., 5-6.) Damage was asked because of the failure of the defendants to furnish the cars for the transportation of the cattle and the failure of the defendants to receive and ship the same as demanded by the plaintiffs. (Pr. Rec., 6-7.) The defendant, The Pecos and Northern Texas Railway Company, by original answer filed May 25th, 1909, plead among other things as follows:

"This defendant demurs to the jurisdiction of this

court and says this court is without jurisdiction to hear and determine the matters in controversy herein for this: plaintiffs sue and seek to recover damages for a failure of The Eastern Railway Company of Texas to furnish cars by them demanded of it for the transportation of cattle over and beyond its line and over the lines of the other defendants interstate from Kenna, New Mexico, a station on the line of The Eastern Railway Company of New Mexico, to Kansas City or St. Joseph, in the state of Missouri, and plaintiffs have no legal right, either at common law or by state statute, to demand and have furnished to it by either of defendants cars to be used in transporting cattle beyond its respective line; but such right of action, if any, plaintiff has for a failure to furnish cars to go interstate and beyond the initial carriers' line, or on the line of any carrier in order, is given and created by the Interstate Commerce law, which vest in the United States courts exclusive jurisdiction to hear and determine such causes." (Pr. Rec., 8.)

The other three defendant railway companies adopted as their own the above demurrer as presented in behalf of The Pecos and Northern Texas Railway Company. (Pr. Rec., 11-12.) This demurrer was presented to the court and overruled (Pr. Rec., 14), and a bill of exceptions was taken to the action of the court in overruling the same and in holding that the state court did have jurisdiction to hear and determine the cause. (Pr. Rec., 15.)

In the same pleading containing said demurrer, defendants answered, as might be done under the Texas practice, that the request and demands for cars alleged by plaintiff to have been made "were unreasonable" and defendants and each of them were unable to comply therewith owing to an unusual and unprecedented demand for cars at such places at and before the time the cattle were tendered at said stations, and that there was an unusual and unprecedented increase in freight busi-

ness at said places and stations at said time, etc. (Pr. Rec., 9 and 10.)

There was a trial by jury on the merits of the case, which resulted in a verdict and judgment in favor of the plaintiffs. (Pr. Rec., 24-25.) The defendant railway companies duly filed their amended motion for a new trial setting up therein the error of the court in refusing to sustain their exception, because of the want of jurisdiction of the court over the subject matter in controversy. (Pr. Rec., 26.) The amended motion for a new trial was overruled and appeal was duly prosecuted to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and in that court the appellant railway companies again assigned as error the action of the trial court in overruling the demurrer to the jurisdiction of the court over the subject matter in controversy. (Pr. Rec., 29.) The Court of Civil Appeals affirmed the judgment of the District Court and by motion for rehearing in that court, the appellant railway companies again assigned as error the action of the court in failing to sustain this demurrer. The motion for rehearing was overruled. (Pr. Rec., 38.) Application for writ of error in behalf of said railway companies was presented to the Supreme Court of Texas and therein as basis for the eighth ground of error assigned, it was again urged that the Circuit Court of the United States had exclusive jurisdiction over the matter in controversy to the exclusion of state courts, etc. (Pr. Rec., 3.) The Supreme Court granted the petition for writ of error (Pr. Rec., 74), but on final hearing affirmed the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, thereby overruling the above assignment. The plaintiffs in error therein duly filed their motion for rehearing and as first ground thereof again interposed this demurrer and urged that

the State courts were without jurisdiction to hear and determine the cause of action. (Pr. Rec., 80.) This motion for rehearing was on May 21st, 1913, "duly considered" and overruled (Pr. Rec., 82), and the present writ of error was sued out.

We have thus briefly stated the condition of the record. There are here presented five assignments of error, but each of same is directed to the sole question in effect that under the Act of June 29th, 1906, known as the Interstate Commerce Act, there is no jurisdiction in a state court to hear and determine a cause of action based on the allegation of a failure to furnish cars interstate, but that the exclusive jurisdiction to hear and determine a cause based upon such alleged failure is either by complaint to the Interstate Commerce Commission or by suit filed in the District Court of the United States for the proper district.

Expressing it differently, our contention is that the assumption of jurisdiction by the state courts in denial of the claim of defendants to immunity from suit under the Interstate Commerce Act, except in the Federal Courts, raised a federal question under Section 237 of the Judicial Code sufficient to confer upon this court jurisdiction to review the case. If the subject matter of this litigation is embraced in the act of Congress, it would seem that there is jurisdiction in this court to review the action of the state courts. It must be remembered that the request for cars in this case was for interstate movement and over several lines of railroad. There is directly involved the question of interstate transportation and obligation to furnish facilities therefor. The act to regulate commerce as amended June 29th, 1906, in Section 1, among other things, provides as follows:

> "And the 'term transportation' shall include cars and other vehicles and all instrumentalities and facil-

ity of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof and all services in connection with receipt, delivery, elevation, and transfer in transit, ventilation, refrigerating or icing, storage, and handling of property transported; and it shall be the duty of every carrier, subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

It seems to be settled that when a right is given by statute and such statute provides a remedy in a particular court, the remedy in that court is exclusive.

Wills on Jurisdiction, Section 154.

Endlich on Interpretation of Statutes, Sections 154 and 433.

Sedgwick on Statutory Construction, 76.

This is the English rule.

Manchester, etc., Ry. Co. v. *Denaby, etc., Colliery Co.*, 14 Q. B. D., 209; same case on appeal, 11 App. Cases, pp. 113-121.

Rhymney Ry. Co. v. *Rhymney Iron Co.*, 25 Q. B. D., 146.

See also,

Fitzgerald v. *Fitzgerald*, 41 Neb., 374.

Copp v. *Louisville, etc., Ry. Co.*, 43 La. Ann., 511.

Carlisle v. *Missouri Pac. Ry. Co.*, 168 Mo., 652.

Swift v. *Philadelphia, etc., Ry. Co.*, 58 Fed. Rep., 858.

Van Patten v. *Chicago, etc., Ry. Co.*, 74 Fed. Rep., 981.

Edmunds v. *Illinois Cent. Ry. Co.*, 80 Fed. Rep., 79.

Transportation includes cars and all instrumentalities of carriage and the Railway Company is required to furnish same "upon reasonable request therefor," and the

furnishing of cars upon reasonable request is now required by the act as much as is the making of a reasonable rate or the refraining from giving undue preference. The duty to do the one is no more mandatory than the other and each is fully and completely covered by the act.

Section 8 of the Interstate Commerce Law provides that if any carrier shall do, cause to be done or permit to be done any act, matter or thing in the act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.

Section 9 of the act provides that any person claiming to be damaged may either make complaint to the Interstate Commerce Commission or may bring suit for the recovery of damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction.

So that, reading the three sections together we have a duty imposed under the first, a cause of action created under the second and a forum prescribed under the third, and it is to be noted that the tribunals given jurisdiction to award damages for a violation of the act or failure to comply with its requirements are specially designated. It is so well established that where Congress has legislated upon a given subject within its cognizance that such legislation is exclusive of State action that we deem it unnecessary to cite authorities. Likewise, that where the forum is prescribed for the redress of a wrong that the remedy so provided and the right of action it-

self is exclusive and it would seem that Section 9 of the act in so far as prescribing a forum was the exercise of a foresight by the Congress that was wise. Obviously harmony in the administration of so important an act is essential to its complete success. As said in *Adams Express Company* v. *Croninger*, 226 U. S., 505:

> "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. *Northern Pacific Ry.* v. *State of Washington*, 222 U. S., 370; *Southern Railway* v. *Reid*, 222 U. S., 424; *Mondou* v. *Railroad*, 223 U. S., 1.
>
> To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment."

So that uniformity in the administration of this law and in the correct ascertainment and awarding of damages for alleged violations thereof so as to result in harmonious and uniform application could only be had by confining jurisdiction to the tribunals named in the act. Whether the request for cars as declared on in this case was reasonable under the circumstances and what damages should be awarded for failure to comply

with the request, if lawful, should not be matters to be left to the varying judgment or decision of the various state courts and of local juries because to do so involves an uncertainty of ruling which is strikingly pointed out in the Croninger case. Was a request for 200 cars made some five months before the date they would be expected for use reasonable? Was such request made at such time solely for the purpose of and would it not have the effect of securing to this particular shipper an undue advantage over others who would make their requests within a reasonable time and with reasonable certainty that they would ship on the date cars which might be ordered? Is a request reasonable for such a number of cars so far ahead unaccompanied by any guarantee or protection to the Railway Company that they would be used at the time or that the Company would be indemnified if they were not used? The rights of other shippers were involved. The carrier was required to practically tie up 200 cars for a considerable length of time and thereby to accord to this shipper a preference. The method of car distribution used by the carriers is here involved. Wherefore, we think it may be pertinently inquired as to whether such questions should not be primarily investigated and determined by the Interstate Commerce Commission in the first instance. This, in order to insure not only uniformity in the administration of the Interstate Commerce Act but to secure to all shippers transportation facilities without undue preference or discrimination.

If a claim for damages upon the ground that a rate that has been charged is unreasonable and, therefore, violative of the Act must be first submitted to the Commission for determination in order to secure uniformity, then must there not also be first submitted to the Commission the question whether the request for transporta-

tion facilities was "reasonable" and that whether the failure of the carrier to comply therewith on account of its method of car distribution owing to the great demand was violative of the act. The question of proper distribution of cars and car service is just as much within the province of the Interstate Commerce Commission and that Act as is a discrimination in rates or against localities.

B. & O. Ry. Co. v. *Pitcairn Coal Co.*, 215 U. S., 481.

Morrisdale Coal Co. v. *Pennsylvania R. R.*, 230 U. S., 304.

We quote from *C. R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S., 434:

> "The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement sec. 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections 'shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty. Thus, by sec. 8 it is provided 'That in case any common carrier subject to the provisions of this act * * * shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in

every case of recovery, which attorney's fee sh
be taxed and collected as part of the costs in t
case.' Further by Sec. 9 an election is given
either make complaint to the Interstate Comme
Commission or to bring, in a designated court,
action for the recovery of damages, and by Sec.
it is made a criminal offense for an employe of
corporation carrier to 'wilfully omit or fail to
any act, matter, or thing in this act required to
done.'

As legislation concerning the delivery of cars
the carriage of interstate traffic was clearly a matt
of interstate commerce regulation, even if such su
ject was embraced within that class of powers co
cerning which the State had a right to exert its a
thority in the absence of legislation by Congress,
must follow in consequence of the action of Co
gress to which we have referred that the power
the State over the subject-matter ceased to ex
from the moment that Congress exerted its pa
mount and all embracing authority over the subje
We say this because the elementary and long s
tled doctrine is that there can be no divided auth
ity over interstate commerce and that the regu
tions of Congress on that subject are supreme.
results, therefore, that in a case where from t
particular nature of certain subjects the State m
exert authority until Congress acts under the
sumption that Congress by inaction has tacitly
thorized it to do so, action by Congress destroys t
possibility of such assumption, since such acti
when exerted, covers the whole field and rend
the State impotent to deal with a subject over wh
it had no inherent but only permissive pow
Southern Ry. Co. v. *Reid*, 222 U. S., 424."

In *Interstate Com. Commission* v. *B. & O. Railro*
145 U. S., 275, Mr. Justice Brown said:

"Prior to the enactment of the act of Februa
4, 1887, to regulate commerce, commonly known
the Interstate Commerce Act, 24 Stat., 379, c. 1
railway traffic in this country was regulated by
principles of the common law applicable to comm
carriers, which demanded little more than that th
should carry for all persons who applied, in the

der in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable."

State statutes, therefore, which impose an obligation to furnish cars demanded in pursuance of some prior specified notice of the shipper created a new right. So it would seem that the amendment of June 29, 1906, to Section 1 of the Interstate Commerce Law, imposing upon every carrier the obligation to furnish cars or vehicles for transportation "upon reasonable request therefor" also created a statutory right different from that at common law since the obligation at common law was merely to have on hand such equipment as was ordinarily required under normal conditions for the usual business at the particular place and the right to demand cars for loading only existed when the freight was tendered.

But as cars for interstate transportation are only to be furnished "upon reasonable request therefor" and the Act does not define what shall constitute a reasonable request or when the same should be made, the case falls under the rule of those under the 1st and 3rd sections of the Act which would require preliminary investigation and determination by the Commission before the courts could be called upon to take jurisdiction. See:

Mitchell Coal Co. v. *Penna. R. R. Co.*, 230 U. S., 258.

It was contended in *T. & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, that the State court had no jurisdiction over an action to recover damages upon the alleged ground that the rate charged was excessive and unreasonable. This court, however, in deciding the case went further and held that uniformity in the administration of the law in that respect could not be had unless such question of the reasonableness of the rate was first submitted to the Interstate Commerce Commission and that there-

fore prior to the decision of the Commission no cou
could have jurisdiction.

The same rule was applied with reference to an actio
to recover damages for alleged discriminatory rates i
Robinson v. *B. & O. R. R.*, 222 U. S., 506.

In the case at bar there was necessarily involved th
question as to the propriety of the distribution made b
the railroad companies of their equipment in view of th
unusual demands at that time for all kinds of cars. A
local jury in a local court as well as the local court itsel
would be apt to ignore the necessities and demands o
other localities and shippers and would pay no heed t
any apparently fair distribution of equipment made b
the carriers, so as to equalize the supply to all localitie
upon their lines. What was the purpose of Congress i
providing in the amendment to the act that "transporta
tion" should include cars and instrumentalities of trans
portation and that it should be the duty of every carrie
to furnish such instrumentalities "upon reasonable re
quest"? Was it not to bring the entire subject matte
under the Interstate Commerce Law so as to secure no
only uniform rules but a uniform administration of th
practices of carriers and also so as to provide that th
matter of damages growing out of any infraction of th
act should be uniformly and consistently ascertaine
and determined so as to prevent any shipper throug
local influences securing advantages not open to al
Such advantages may be as well secured throug
claims for alleged damages growing out of violation o
the act as by other means.

Necessarily the question as to what are proximat
and legitimate damages arising out of an alleged viola
tion or infraction of the Interstate Commerce Act an
which may be recovered, is one of federal law and ca
only be uniformly determined by confining jurisdictio

to the federal courts. Otherwise, there would be the greatest contrariety in the enforcement of the act. For instance, the rule of damages arising out of discrimination in rates applied by this court in *Pennsylvania R. R. v. International Coal Co.*, 230 U. S., 184, would probably not be applied in some of the State courts.

We think the conclusion is irresistible that the furnishing cars for interstate transportation and the obligation of the carrier in respect thereto, are matters governed wholly and solely by the provisions of the Interstate Commerce Act heretofore quoted. The carrier and shipper can no longer enter into any special contract or agreement covering such matters and the common law which might theretofore have authorized a special undertaking or agreement relative to furnishing cars was plainly abrogated by the above act, so that no court would have the right, power or jurisdiction to enforce such a special undertaking and the attempted enforcement thereof by a state court, being clearly violative of the act of Congress, would seem to give to this court jurisdiction to review the ruling.

The obligation of the railroad company in this behalf is dependent solely upon the act of Congress and the question whether it failed to comply with the requirement of that act in respect to furnishing cars and resulting damage was for the sole and exclusive determination of the Interstate Commerce Commission and federal courts as provided in the act. That Congress intended the jurisdiction to hear and determine such matters to be exclusive of state courts we think has been frequently decided.

Van Patten v. *Railway Company*, 74 Federal, 981.

Sheldon v. *Wabash Railroad*, 105 Federal, 785.

Northern Pacific Ry. Co. v. *Pacific Coast Lumber Manufacturers' Association*, 91 C. C. A., 40.
Central Stock Yards Co. v. *L. & N. R. R.*, 112 Federal, 823.

Loomis vs Lehigh Valley R.R. Co, 10 Fed. E. 908

As analogous and indicating, in a measure at least, not only the exclusive character of federal legislation on a given subject but directly the effect of an act of Congress imposing duties on railway companies relative to furnishing cars, this court held in *Houston & Texas Central R. R.* v. *Mayes*, 201 U. S., 321, which arose before the Hepburn Act, that a Texas statute attempting to regulate the furnishing of cars for interstate commerce transcended the limits of the proper police power of the state. We quote as follows:

> "Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damages could actually have resulted to the shippers.
>
> It should be borne in mind that the act does not apply to cattle alone, but to all cases 'when the owner, manager or shipper of any freight of any kind shall make application in writing,' etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of $25 for each car, though the detention of the cotton involved no expense to the owner, or may even have resulted in a benefit to him through a rise in the market.

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

We also refer to *Southern Ry. Co.* v. *Reid*, 222 U. S., 424.

A reading of the section of the Interstate Commerce Act as applied to this particular subject impels the conclusion that it was intended to IMPOSE a duty on a carrier in respect to the furnishing of cars for interstate traffic. The use of the word "impose" indicates that the act CREATED a duty that was not merely declaratory of a common law duty theretofore existing. If it imposed a new duty, and it evidently did, the method of enforcement was likewise prescribed, and the method of enforcement is as much exclusive as any other obligation arising under the act.

As we understand the case of *United States* v. *Pacific & Arctic Co.*, 228 U. S., 87, which was a criminal prosecution, charging violations of the Anti-Trust Act and Interstate Commerce Law, this court again held in principle that the purpose of the Interstate Commerce Act is to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act, and that the conduct of carriers is not subject to judicial review

based on alleged violations of indefinite provisions of the act until submitted to and passed on by the Commission. The failure of the railway companies involved in this suit to distribute and furnish the cars under the contract alleged, is a subject that is fully covered by the act of Congress and upon this question there would seem to be great necessity for a uniform ruling which could only be had by the prior consideration and determination of a single tribunal.

The charge in effect is made in plaintiff's petition that there was an obligation on the part of the railway companies to operate a through route and to furnish the facilities therefor, but this obligation cannot longer rest upon any special contract or agreement but must be found either in the federal law or in the tariffs of the connecting carriers filed in accordance therewith.

The entire subject is fully covered by the federal act, and there can be no cause of action that is not based thereon and as the obligation is at least quasi criminal, the remedies provided must be strictly pursued.

The Supreme Court of Texas in *G. C. & S. F. Ry. Co.* v. *Moore,* 98 Texas, 302, held that the right of action given by Section 3 of the Interstate Commerce law prohibiting undue preference by railways could be enforced only in the tribunals, on which jurisdiction is conferred by that act—in the United States courts or before the Interstate Commerce Commission—and does not sustain an action in the state court for failing to stop a train at a way station to discharge a passenger by rendering the discrimination made by the carrier in that regard between passengers holding tickets of different character an unlawful one.

We think it, therefore, appears that a defense interposed by the defendants in the original action was based

upon a federal statute. The defense, if good, was a material one and went to the basis of the action itself. Such defense was called to the attenion of the state courts and overruled. It was necessary that this defense should be overruled before the judgments entered in the state court could have been rendered. It would seem to be apparent, therefore, that there is here drawn in question a title, right, privilege or immunity claimed under a statute of the United States, and that the decision has been against the right, title, privilege or immunity so set up and claimed. The defendants denied the right of the state courts to entertain jurisdiction of this cause of action. Jurisdiction was entertained and as said by this court in *Illinois Central R. R.* v. *McKendree,* 203 U. S., 525, the state courts necessarily decided against the right, title or immunity asserted by the defendant.

It was also held in *St. L., I. M. & S. Ry.* v. *Taylor,* 210 U. S., 281, that the denial by a state court to give to a federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right of immunity under the laws of the United States and presents a federal question reviewable by this court.

We quote:

> "Congress has regulated and limited the appellate jurisdiction of this court over the state courts by Sec. 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock* v. *Memphis,* 20 Wall., 590, 620. The words of that section material here are those authorizing this court to re-examine the judgments of the state courts 'where any title, right, privilege, or immunity is claimed under * * * any statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such * * * stat-

ute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the state courts. The question, therefore, precisely stated, is whether it was a claim of right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick* v. *Market Bank*, 165 U. S., 538; *California Bank* v. *Kennedy*, 167 U. S., 362; *San Jose Land and Water Co.* v. *San Jose Ranch Co.*, 189 U. S., 177; *Nutt* v. *Knut*, 200 U. S., 12; *Rector* v. *City Deposit Bank*, 200 U. S., 405; *Illinois Central Railroad* v. *McKendree*, 203 U. S., 514; *Eau Claire National Bank* v. *Jackman*, 204 U. S., 522; *Hammond* v. *Whittredge*, 204 U. S., 538. The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

Proponents of the motion in the case at bar assert that the questions presented in the state courts were questions of fact, but this can not be sound because the question at issue is one of *jurisdiction* and is a question of law and one concerning which neither evidence was offered nor was same necessary. It arose at the threshold of the proceeding and is a question which it would seem

will be considered by this court even without a specific assignment of error.

We quote from *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S., 492:

> "One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts, under the circumstances disclosed by the record, to grant the relief prayed consistently with the provisions of the act to regulate commerce, and to that subject we therefore at once come."

Again on writ of error to the state court this court may examine the entire record, including the evidence, to determine whether what purports to be a finding of fact is not so involved with, and dependent upon, questions of federal law, as to be really a decision thereof.

Kansas City Southern Railway v. *Albers Commission Co.*, 223 U. S., 573.

See, also:

St. L., S. F. & T. Ry. v. *Seale*, 229 U. S., 156.

We respectfully submit the motion to dismiss should be overruled.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
ROBERT DUNLAP,
Attorneys for Plaintiffs in Error.

GARDINER LATHROP,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 320

THE EASTERN RAILWAY COMPANY OF NEW MEXICO, THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY, ET AL.,

Plaintiffs in Error.

V.

GEORGE W. LITTLEFIELD, J. P. WHITE AND THOMAS D. WHITE, COMPOSING THE FIRM OF LITTLEFIELD CATTLE COMPANY,

Defendants in Error.

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR.

TO SAID HONORABLE COURT:

George W. Littlefield, J. P. White and Thomas D. White, composing the firm of Littlefield Cattle Company, Defendants in Error, come now and file this their motion to dismiss the writ of error herein granted by this Honorable Court, and they move the court to dismiss the writ of error herein granted because this court is without jurisdiction to try and determine this cause and to grant the relief prayed for by plaintiffs in error for the following reasons, to-wit:

FIRST. Because the record herein fails to show, (1) That some right, privilege or immunity under some statute of the United States was seasonably set up and claimed by plaintiffs in error in the State Court, and, (2) That such right, privilege or immunity was denied by said Court.

SECOND. Because the record herein filed shows affirmatively that exclusive jurisdiction to try and determine this cause was not vested in the United States Courts to the exclusion of the State Courts.

THIRD. Because the record herein shows that the alleged errors of which plaintiffs in error complain involve only questions of fact which were duly tried and determined by the State Courts adversely to plaintiffs in error, and this court has no jurisdiction to review the rulings and decision of the State Courts on such questions of fact.

FOURTH. Because the alleged errors were not seasonably presented to and reviewed by the State Courts in such a way as to confer on this court jurisdiction to review and correct such alleged errors.

FIFTH. Because the record herein shows affirmatively that the judgment rendered by the State Courts was and is not void for want of jurisdiction.

In support of this motion, said defendants in error file and submit herewith their brief in support thereof, and they pray that same be considered in connection therewith.

Respectfully submitted,

W. A. DUNN,

J. A. TEMPLETON,

Attorneys for George W. Littlefield, J. P. White and Thomas D. White, comprising the firm of Littlefield Cattle Company, Defendants in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 320

THE EASTERN RAILWAY COMPANY OF NEW MEXICO, THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. LITTLEFIELD, J. P. WHITE AND THOMAS D. WHITE, COMPOSING THE FIRM OF LITTLEFIELD CATTLE COMPANY, DEFENDANTS IN ERROR.

BRIEF OF ARGUMENT FOR DEFENDANTS IN ERROR IN REPLY TO BRIEF FILED BY PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

W. A. DUNN,
J. A. TEMPLETON,
Attorneys for Defendants in Error.

D. T. BOMAR,
Of Counsel for Defendants in Error.

BRIEF OF ARGUMENT.

Plaintiffs in error concede that the only question presented by the record herein for the decision of this Honorable Court is whether or not the state courts had jurisdiction to render the judgment complained of. Their contention being, "That under the Act of June 29, 1906, known as the Interstate Commerce Act, there is no jurisdiction in a State Court to hear and determine a cause of action based on an allegation of a failure to furnish cars interstate, but that the exclusive jurisdiction to hear and determine a cause based on such an alleged failure is either by complaint to the Interstate Commerce Commission, or by suit filed in the District Court of the United States for the proper District."

In replying to this contention, we reiterate our previous statement to the effect that the defendants in error did not in their petition seek redress for any discrimination either in rates or in the distribution of cars. Neither did they seek to recover damages occasioned by the carriers failure to furnish cars for the movement of the cattle beyond their respective lines of rail-

way. Nor was the action one to recover a penalty provided by any statute for the failure to furnish cars when demanded or to enforce by mandamus or otherwise the performance by the carriers of the duty to furnish cars for the shipment upon reasonable request being made therefor.

On the contrary the sole purpose of the action was to recover such damages as the plaintiffs had sustained by the negligence of the defendants in failing to furnish within a reasonable time after demand made therefor, any cars whatever for the movement of plaintiffs' cattle over any of said lines of railway.

The petition charged that the defendants were notified and requested to furnish the cars on the several dates specified and at the stations named in the notice, which notice was given and accepted first in May 1907; and same was thereafter renewed early in September of said year.

It was charged that such notice and demand was reasonable, and that the defendants were guilty of negligence in failing to comply therewith. Record 4 to 7.

The charge of the court submitting the case to the jury was as follows viz; Record 15 to 19.

Gentlemen of the Jury:

The Court instructs you as to the rules of law applicable to this case as follows, viz:

1. The burden of the proof in this case rests upon the plaintiffs, and before they can recover, plaintiffs must establish by a preponderance of the evidence all the facts necessary to their recovery.

2. Ordinary care, as that term is used in these instructions, mean such care as a person of ordinary prudence would commonly exercise under like circumstances, and the failure to exercise such care and prudence is negligence, as that term is used in this charge.

3. You are instructed that it is the duty of a railway company when engaged in the transportation of freight over its lines of railway to provide and furnish for the use of shippers who desire to have their property transported over such lines of railway, suitable cars wherein to transport such property and to furnish same within a reasonable time after receiving from such shippers notice the number and kind of cars desired and which are necessary for the transportation of such property; and the failure to exercise ordinary care to furnish such cars within a reasonable time after the receipt of such notice constitutes negligence.

4. If you believe and find from the evidence that on or about the 9th day of May, 1907, the plaintiffs gave the defendants through W. S. Merrill, the station agent of defendants at Bovina, Texas, notice of the number and kind of cars
150 which they desired to use in the shipment of their cattle and for the time and place when and where such cars were desired for such use, and if you further find and believe from the evidence that the defendant received and accepted such

notice and that the notice so given was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars at the time and place specified in such notice, unless you should find from the evidence that such request was thereafter withdrawn or abandoned by the plaintiffs. And you are further instructed in this connection, that if you should find and believe from the evidence that the plaintiffs, after placing with defendants their orders for one hundred cars to be furnished at Bovina, Texas, requested the defendants to transfer such cars from Bovina, Texas, to Kenna, New Mexico, and to furnish same at said last named station, and that plaintiffs in making such request of defendants, gave to them a reasonable notice of thte time when such cars were desired for use at Kenna, and if you further find and believe from the evidence that the notice as given was a reasonablee one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars for plaintiff's use at such station of Kenna within a reasonable time after receiving from plaintiffs notice to so do, and a failure on the part of defendants to exercise such care to furnish such cars as were reasonably necessary for the movement of plaintiffs' cattle (not exceeding, however, the number specified in such notice) would constitute negligence.

5. If you should find and believe from the evidence that the plaintiffs about the last of August or first of September, 1907, notified defendants through their operator at Kenna, New Mexico, that they desired a sufficient number of cars to be furnished at said station for the use of plaintiffs in the shipment of their said cattle from said station to Kansas City or St. Joe,
151 Missouri, and the plaintiffs in giving such notice and in making such request notified defendants of the number of cars so desired and that they desired same to be furnished at said station on the 15th day of September, 1907, or as soon thereafter as the cars could be furnished, and if you further find and believe from the evidence that the notice so given and the request so made was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars as were reasonably necessary for the movement of pliantiffs' cattle within a reasonable time after receiving such notice and a failure to exercise ordinary care to furnish such cars would constitute negligence on the part of the defendants.

6. If you find and believe from the evidence that the plaintiffs about the 9th day of September, 1907, or soon thereafter, relying on the duty imposed upon defendants to furnish the cars which they had requested defendants to furnish for the movement of their cattle (if you find that such request had been made) brought to said station of Kenna about thirty nine hundred head of cattle which they desired to ship to Kansas City and St. Joe, Missouri, as alleged in plaintiffs' petition, and if you

further find and believe from the evidence that said cattle were tendered to defendants at said station for shipment over defendants' lines of railway from such station to Kansas City and St. Joe, Missouri, and if you further find and believe from the evidence that the defendants negligently failed or refused to furnish for plaintiffs' use within a reasonable time after such cattle were so tendered to them for shipment a sufficient number of cars wherein to transport such cattle to their destination, and if you further find and believe from the evidence that said defendants in so failing and refusing to furnish such cars, were
152 guilty of negligence, as that term is defined in this charge, and if you further find and believe from the evidence that as a result of such negligence, the plaintiffs were deprived of the opportunity to transport their said cattle to Kansas City and St. Joe, Mo., and that but for such negligence they would have shipped a number of their said cattle to Kansas City and the remainder thereof to St. Joe, Missouri, where said cattle would have been sold on the markets existing at said places, and if you further find and believe from the evidence that as a result of such negligence on the part of defendants (if you find there was negligence) plaintiffs have suffered injury or damage from their inability to so ship and sell said cattle, then you are instructed that plaintiffs are entitled to recover of and from the said defendants, such injury and damage as you may find from the evidence was the direct and proximate result of the defendants' negligence (if any) for failing to furnish cars for the movement of such cattle to said markets.

7. If under the foregoing instructions you should fail to find from a preponderance of the evidence that defendants were guilty of negligence in failing to furnish cars wherein to ship plaintiffs' cattle and in failing to accept and transport said cattle to the markets at Kansas City and St. Joe as requested by plaintiffs, or if you should fail to find from the evidence that the plaintiffs suffered any injury or damage as a result of the defendants' negligence, if you find there was such negligence, then in either of such events, you will find for defendants.

8. If you should fail to find from the evidence that the notice and request given to defendants by plaintiffs to furnish a sufficient number of cars wherein to ship plaintiffs' cattle was a reasonable one, or if you should fail to find that defendants were guilty of negligence in failing to comply with such request, then you are instructed to find for defendants.

153 9. If you believe and find from the evidence that at the time or times when plaintiffs notified defendants to furnish a sufficient number of cars wherein to move their said cattle, there was an unusual or unprecedented rush of business and demand for cars and motive power on defendants' lines of railway and that such unusual and unprecedented rush and demand continued during the months of September and October, 1907, while said plaintiffs' cattle were being held for shipment at said station at Kenna, and if you further find and believe from

the evidence that the defendants under the circumstances then existing could not by the exercise of ordinary care have foreseen and provided against such unusual rush and unprecedented demand for cars and motive power and that they could not by the exercise of ordinary care procure sufficient motive power and cars to transport plaintiffs' cattle to market when same were tendered to defendants for shipment, or within a reasonable time thereafter, and that said defendants were not guilty of negligence in failing so to do, then you are instructed to find for the defendants. But you are further charged in this connection that it was the duty of defendants to exercise ordinary care to provide sufficient motive power, cars and facilities for the movement of traffic over their lines of railway, which by the exercise of such care might reasonably have been anticipated and provided for and a failure to exercise such care would constitute negligence, and if plaintiffs were injured by such negligence they would be entitled to recover of defendants such damage as proximately resulted to them from said negligence.

10. If you believe and find from the evidence that the plaintiffs or their employes in charge of said cattle which were held at Kenna for shipment were guilty of negligence in bringing said cattle into said station at the time the same were brought
154 there, or in holding said cattle near said station, while waiting for cars wherein to ship same and if you further find and believe from the evidence that said cattle were injured or damaged as a result of such negligence, then you are instructed that plaintiffs can not recover such damage, if any, as you find resulted from their own negligence, or that of their employes. Any and all injuries or damages so sustained by said cattle through the fault and neglect of the plaintiffs, are not recoverable in this suit and should be excluded from you consideration in assessing the damage, if any, which plaintiffs are entitled to recover.

11. If under the foregoing instructions, you should find for the plaintiffs, then you are instructed that in assessing the damage you will ascertain and find from the evidence:

(*a*) The market value on the markets at Kansas City and St. Joe, Missouri, of such of plaintiffs' said cattle as you find and believe from the evidence would have been shipped by plaintiffs to and sold on said markets, respectively, such value to be estimated on the dates on which said cattle would have been so sold on said markets;

(*b*) You will then deduct from such market values the usual and necessary expenses incident to the transportation and sale of such cattle on said markets;

(*c*) You will then find the market values of such cattle at Kenna, New Mexico, at the time when plaintiffs ascertained that they could not procure cars in which to ship the same to said markets, provided such cattle had a market value at such time and place, but if you find they had no such market value at that time and place, you will then find from the evidence the intrinsic

value of such cattle at such time and place. In this connection you are charged that if you should find under paragraph 10 of this charge that plaintiffs' said cattle while being brought to Kenna or held there for shipment, were injured and damaged as a result of the negligence of plaintiffs or their employes in so bringing in and holding said cattle as they did, then in
155 estimating the value of said cattle at Kenna, you will estimate and find same in the condition said cattle would have been in at such time and place but for the negligence of plaintiffs and their employes.

(*d*) If you find from the evidence that the net market value of such cattle on said markets exceeds the value of such cattle at Kenna, estimated as above stated, then you will find the difference between such value at Kenna and the net market value of such cattle on the markets at Kansas City and St. Joe, Missouri.

(*e*) You will then find the expenses, if any, necessarily and properly incurred by plaintiffs in holding said cattle at Kenna while waiting for cars in which to ship them, if you find there was any such expense incurred;

(*f*) You will then add the amount of such expenses so found, if any, to the difference between the value of said cattle at Kenna and the net market value of said cattle at Kansas City and St. Joe, Missouri, as above ascertained, and you will return a verdict in favor of plaintiffs against the defendants for the amount so found, together with six per cent per annum interest thereon from the first day of November, 1907, to the present time.

12. If under the foregoing instructions you find for the defendants, you will simply so state in your verdict.

13. You are the sole judges of the credibility of the witnesses and the weight of the evidence, but the law you must receive from the Court and be governed thereby.

D. B. HILL,
Dist. Judge, 69th Judicial Dist. of Texas.

It thus appears that the plaintiffs' cause of action was predicated on the defendants' negligence in failing to discharge their common law duty to furnish within a reasonable time after demand made therefor, a sufficient number of suitable cars for the movement of the cattle in question. That the plaintiffs were entitled to recover at common law damages occasioned by the breach of such duty, and that this right of recovery was not created by the Interstate Commerce Act is, we think, too clear for argument. See Hutchinson on Carriers, Sections 292, 293, 497. Ayers vs. Chicago &c Ry. Co., 5 Am. St. 226. Rapalje and Macks Digest, Railway Law, Vol. 1, Pages 737 and 738, and authorities there cited. Cinn, etc. Ry. Co. vs. Fairbanks, 33 C. C. A. 611. C. & A. Ry. Co. vs. Davis, 159 Ill. 53; 50 Am. St. 143. Loomis vs. Ry. Co., 101 N. E. 911.

The state statutes in so far as same made it the duty of the carriers to furnish upon reasonable notice so to do a sufficient number of suitable cars to move the cattle, were but expressive of the

common law on this subject, and such statutes are not in conflict with the Interstate Commerce Act and they impose no burden upon interstate commerce. We therefore deny—That the Interstate Commerce Act creates the right or prescribes the remedy which the plaintiffs seek to enforce in this case. Section 22 of said Act expressly preserves "all remedies now existing at common law," saving only such as are inconsistent with the proper enforcement of the Act. That the present action is not of the character indicated is, we think, clearly held by this court in T. & P. Ry. Co. vs. Abilene Cotton Oil company, 204 U. S. 426, 51 L. Ed. 553. G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S. 481, 56 L. Ed. 522, 523. Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S. 186, 208, 55 L. Ed. 183. Re Winn, 213 U. S. 458, 459, 53 L. Ed. 873, 874.

But conceding for the moment that the Interstate Commerce Act creates the right of action which plaintiffs seek to enforce; does said Act provide either in terms or by necessary implication that such right can be enforced only by complaint made to the Interstate Commerce Commission or by action in the United States Court of the proper District? That the Act does not so expressly provide seems clear. Should it be construed to so provide by implication? In G. H. & S. A. Ry. Co. vs. Wallace, cited above, this court said:

"Where the statute creating the right provides an exclusive remedy to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication, and considering the relation between the Federal and State Government, there is no presumption that Congress intended to prevent State Courts from exercising the general jurisdiction already possessed by them and under which they had the power to hear and determine causes of action created by Federal Statute. Robb vs. Connolly, 111 U. S. 637, 28 L. Ed. 546.

"On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal but civil and transitory, it was to be subject to the principles governing that class of cases and might be asserted in a State Court as well as in those of the United States. This presumption would be strengthened as to a statute like this passed not only for the purpose of giving a right, but of affording a convenient remedy."

To the same effect is the holding of this Court *in re* Mondou vs. N. Y. etc. Ry. Co., 223 U. S. 1, 56, 58; 56 L. Ed. 348, 349, wherein the Court said:

"We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal Courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, 'That the circuit courts of the United States shall have cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest

and costs, the sum or value of two thousand dollars, and arisin
under the Constitution or Laws of the United States.' 25 Stat. a
L. 433, Chap. 866; 1 U. S. Comp. Stat. 1901, Page 508; Robb v
Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 Sup. Ct. Re
544; United States vs. Barnes, 222 U. S. 513, ante, 291, 32 Sup. C
Rep. 117. The suggestion that the act of Congress is not in ha
mony with the policy of the state, and therefore that the courts
the state are free to decline jurisdiction, is quite inadmissible, b
cause it presupposes what in legal contemplation does not exis
When Congress, in the exertion of the power confided to it by th
constitution, adopted that act, it spoke for all the people and a
the states, and thereby established a policy for all. That polic
is as much the policy of Connecticut as if the act had eminate
from its own legislature, and should be respected accordingly i
the courts of the state. As was said by this court in Claflin v
Houseman, 93 U. S. 130, 136, 137, 23 L. Ed. 833, 838, 839:

" 'The laws of the United States are laws in the several state
and just as much binding on the citizens and courts thereof as th
state laws are. The United States is not a foreign sovereignty a
regards the several states, but is a concurrent, and, within its juri
diction, paramount, sovereignty. . . . If an act of Congress give
a penalty (meaning civil and remedial) to a party aggrieve
without specifying a remedy for its enforcement, there is no rea
son why it should not be enforced, if not provided otherwise b
some act of Congress, by a proper action in a state court. Th
fact that a state court derives its existence and functions fro
the state laws is no reason why it should not afford relief; becaus
it is subject also to the laws of the United States, and is just a
much bound to recognize these as operative within the state as
is to recognize the state laws. The two together form one syste
of jurisprudence, which constitutes the law of the land for th
state; and the courts of the two jurisdictions are not foreign t
each other, nor to be treated by each other as such, but as court
of the same country, having jurisdiction partly different and par
ly concurrent. . . . It is true, the sovereignties are distinct, an
neither can interfere with the proper jurisdiction of the other, a
was so clearly shown by Chief Justice Taney, in the case of Abl
man vs. Booth, 21 How. 506, 16 L. Ed. 169; hence the state court
have no power to revise the action of the Federal Courts, nor th
Federal the State, except where the Federal Constitution or law
are involved. But this is no reason why the state courts shoul
not be open for the prosecution of rights growing out of the laws
the United States, to which their jurisdiction is competent, an
not denied." '

Do the authorities cited by plaintiffs in error contravene th
rule announced in the authorities cited above? Surely not. Th
question recurs; are they applicable to this case as presented b
the record herein? Let us see. Adams Express Co. vs. Croni
ger, 226 U. S. 491. This court stated the question presented fo
decision in that case as follows, viz.: "The question upon whic
the case must turn is whether the operation and effect of the co

tract for an interstate shipment, as shown by the receipt of bill of lading, is governed by the local law of the state, or by the acts of Congress regulating interstate commerce." Ib. 499, 500.

Manifestly it was with reference to this particuar question that the court used the language quoted in plaintiffs in error's brief. This case was originally instituted and tried in the State Court of Kentucky, and the writ of error was granted by this court to the state court to review the judgment rendered. The jurisdiction of the state court was not questioned, but was on the contrary recognized by this court. The court, after stating the purpose of the act under investigation, said; "This was doubtless the purpose of the law, and this purpose will be effectuated and not impaired or destroyed by the state courts obeying and enforcing the provisions of the Federal Statute where applicable to the fact in such cases as come before them." Ib. 505. B. &. O. Ry. Co. vs. U. S. Ex. Rel. Pitcairn Coal Co., 215 US 481, 500. This was an action to control by Mandamus the distribution of coal cars and to prohibit unjust preferences and undue discriminations by the carrier. Clearly the question there involved was an administrative one which was cognizable in the first instance before the Interstate Commerce Commission, and it was so held, and the judgment of the United States Circuit Court and of the Circuit Court of Appeals granting the mandamus prayed for, was reversed with instructions to dismiss the petition.

Morrisdale Coal Co. vs. Penn. Ry. Co. This was a suit by a shipper to recover damages from a carrier because of discrimination in granting rebates to other shippers. The action was instituted in the United States Circuit Court without first applying to the Interstate Commerce Commission for redress. Reversed and dismissed for want of jurisdiction.

C. R. I. & P. Ry. Co. vs. Hardwick &c Elevator Co., 226 US 426. This was an action instituted in the state court to recover statutory penalties imposed by a statute of the state of Minnesota, on carriers for a failure to furnish cars for the shipment of interstate freight. The question at issue was the validity of such a penal statute as applied to interstate carriers. This court held such statute as applied to interstate freight invalid because in conflict with the Interstate Commerce Act. The jurisdiction of the state court to try and determine such a suit was not raised in the case, but such jurisdiction seems to have been recognized, as the case was remanded to the State Trial Court for further proceedings.

Interstate Commerce Commission vs. B. & O. Ry. Co., 145 US 263. This was an action brought before the Interstate Commerce Commission by the Pittsburg etc. Ry. Co. against the B. & O. Ry. Co. to compel that company to withdraw certain rates and to decline to give such rates in the future etc., on the ground that such rates were unjustly discriminating. The jurisdiction of the state courts was in no way involved in the decision.

Mitchell Coal Company vs. Penn. Ry. Co. 230 US 258. This action was instituted in the United States Circuit Court to recover

damages allaged to have been occasioned by the payment of rebates to the plaintiffs competitors in business, whereby his business was injured by discrimination in rates. The jurisdiction of the State Courts over such an action was in no way involved in the action.

T. & P. Ry. Co. vs. Abilene Cotton Oil Company, 204 US 426, 448. The question involved in this case was the power of the state courts to declare unreasonable, and to disregard certain rates, on interstate shipments which had been filed with, and approved by, the Interstate Commerce Commission. This court denied such power and held that redress for such wrongs as were complained of, must be sought in the first instance before the Interstate Commerce Commission. No such issue is involved in the case at bar.

Robinson vs. B. & O. Ry. Co. 222 US 506, 512. This was an action by a shipper to recover of a carrier an excessive freight charge which he claimed to have paid under a rate which he attacked as unjustly discriminatory. The court held that application to the Interstate Commerce Commission for redress, and action by it, on the complaint was a prerequisite to the action.

Penn. Ry. Co. vs. International Coal Mining Company, 230 US 184, 247. This action was instituted in the United States Circuit Court by a shipper to recover certain freight charges which it claimed to have paid in excess of the published rate. Two questions were involved on the appeal, viz; (1.) The jurisdiction of the trial court over such an action and; (2.) Whether the plaintiff paid more than the published tariff rate. This court decided the first question in the affirmative and the second in the negative.

H. & T. C. Ry. Co. vs. Mayes, 201 US 321, 331. In this case the question presented and decided was the validity of the Texas Statute prescribing a penalty for failing to furnish cars for an interstate shipment. The court held the Statute invalid for the same reasons that a similar Statute in Minnesota was held invalid. The jurisdiction of the state court to entertain such an action was not questioned.

Southern Ry. Co. vs. Reid, 222 US 424, 444. This was an action brought in the state court to recover statutory penalties imposed by a state statute on the carrier for failure to receive and ship freight tendered for interstate shipment. The question presented and decided was the validity of such penal statute as applied to interstate shipments. The same ruling was made as in the Minnesota and Texas cases above noticed, and the statute was held to be invalid. The court said, "If a penalty of $50.00 for refusing to receive freight "when tendered" be no burden on interstate commerce, beyond the power of the state to impose, would a penalty of $100 or $1,000 likewise be no burden. May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina Statute, it must be remembered, is independent of the damage received, and what excuses or defenses may be offered, the decisions of the court

leave in doubt. The statute seems to permit none." Ib. 443.

United States vs. Pacific & Arctic Co. 228 US 87. This case is so manifestly inapplicable to the issue we are discussing that comment on it is unnecessary.

G. C. & S. F. Ry. Co. vs. Moore, 98 Tex. 302. This was an action by an interstate passenger against the carrier for damages alleged to have been occasioned by the latter's failure to stop its train and let such passenger off at a station at which that train was not scheduled to stop. The Supreme Court of Texas held that the plaintiff could not recover either at common law or under any statute of the state, but that whatever right of action he had was based on a supposed violation of the Interstate Commerce Act by the carrier, exclusive jurisdiction whereof was by the terms of that act vested in the United States Courts. Whether this decision is or is not correct, as applied to the facts of that case, is not material here, since in this case the plaintiffs clearly had a cause of action at common law to recover damages occasioned by defendant's negligence in failing to furnish, upon reasonable request therefor, cars for the shipment of their cattle.

Van Patten vs. Railway Company, 74 Fed. 981. This was an action by a shipper to recover of the carrier an overcharge in freight rates on an interstate shipment on the ground that the excessive rate exacted and paid was discriminatory.

Sheldon vs. Wabash Ry. Co. 105 Fed. 785. This was an action of mandamus brought by the plaintiff to compel the defendant to cease the enforcement of discriminatory rates of which the plaintiff complained.

Northern Pacific Ry. Co. vs Pacific Coast Lumber Co. 91 CCA 40. This was an action brought in the United States Circuit Court by a number of shippers to enjoin the defendant carrier from putting into effect a proposed increase in certain interstate rates on lumber shipments, etc., on the ground that such rates were unjust, unreasonable, etc. One of the questions presented was the jurisdiction of the trial court to grant the relief prayed for in the absence of a prior application to the Interstate Commerce Commission for relief against the proposed rates. The Circuit Court of Appeals upheld the jurisdiction of the court to grant the injunction until the reasonableness of the rates was passed on by the commission. Clearly neither of the three cases last noticed are applicable to the question here at issue.

Central Stock Yards Company vs. L. & N. Ry. Co. 112 Fed. 823. This was an action by the Central Stock Yards Company, complainant against the railway company, wherein the former by its bill in equity filed in the United States Circuit Court, sought in advance of a hearing on the merits, by temporary mandatory injunction, to compel the defendant to deliver to its stock yards in Louisville, Ky., certain live-stock shipped interstate to the City of Louisville, and which the defendant delivered at the Bourbon Stock Yards in said City; which yards were located not on the defendant's line, but on the line of the Southern Railway Company, a competitive carrier. It seems that the defendant had by

contract with the Bourbon Stock Yards Company, obligated itself to deliver all such stock coming into said City at the yards of the company last named, which were on the defendant's line. Two questions were presented to the court for decision, viz; (1.) The jurisdiction of the court to grant the relief prayed for and; (2.) The right of the relief sought by complainant in advance of a hearing on the merits. The former question was decided in tthe affirmative, and the latter in the negative. In passing on the jurisdictional question, the court held that no such right as was sought to be enforced in this case existed at common law, and that whatever right the complainant had to the relief sought was created by the Interstate Commerce Act, and as this action was brought to compel the defendant by mandatory injunction, to discharge a duty imposed by that act, the United States Circuit Court of the proper district had jurisdiction of the action. It, is we think manifest that the question thus presented and decided is very different from the one presented in the case at bar, and that the decision referred to has no bearing in the present case.

Loomis vs. Lehigh Valley Ry. Co. 101 N. E. 908. This was an action brought by a shipper against the carrier in the State Court of New York to recover the amounts expended by the shipper in preparing certain cars for the shipments of grain moving interstate; the carriers having refused to make the necessary changes in the cars. The majority of the Court of Appeals held that the state court had no jurisdiction of such an action, and that exclusive jurisdiction therof was vested in the United States Court of the proper district.

Judge Gray dissented and held that the state court had jurisdiction of the action. It seems that the majority of the court were of the opinion that the expense of changing the cars in some way affected the interstate freight rates.

As we view it, none of the cases cited by the plaintiffs in error support their contention that the state court was without jurisdiction to try and determine the cause of action herein declared on, or to grant the relief sought.

So believing, we insist that the writ of error granted herein should be dismissed for want of jurisdiction, and we so pray.

Respectfully submitted,

W. A. DUNN,

J. A. TEMPLETON,

Attorneys for Plaintiffs in Error.

D. T. BOMAR,

Of Counsel.

BRIEF OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

THE EASTERN RAILWAY COMPANY OF NEW MEXICO, THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

VS No. 320.

GEORGE W. LITTLEFIELD, J. P. WHITE AND THOMAS D. WHITE, COMPOSING THE FIRM OF LITTLEFIELD CATTLE COMPANY, DEFENDANTS IN ERROR.

To the Honorable Supreme Court of the United States:

George W. Littlefield, J. P. White, and Thomas D. White, composing the firm of Littlefield Cattle Company, defendants in error, come now and controvert the statement of the case made by the plaintiffs in error in their petition for writ of error, and in their brief herein, to the effect that a right, title, privilege or immunity is claimed under a statute of the United States, and an authority exercised under the United States and that the decision was against such right, title or immunity under such statute and under such authority.

They also controvert the statement made by plaintiffs in error, to the effect that the plaintiffs' cause of action was pred-

icated on any provision of the law regulating interstate commerce, and that exclusive jurisdiction to hear and determine such cause of action was vested in the United States Court of the proper district, to the exclusion of the State courts. In support of this contention we submit the following as a correct

STATEMENT OF THE CASE.

The plaintiffs sued the several defendants as agents and partners to recover several thousand dollars damages which they claimed to have sustained as a result of the defendants' negligence in failing to furnish for plaintiffs' use at Kenna, New Mexico, within a reasonable time after receiving notice so to do, a sufficient number of cars wherein to ship from said station certain cattle which plaintiffs tendered there for shipment to the markets at Kanass City and St. Joe, Missouri.

The petition does not charge any discrimination against plaintiffs in favor of any other persons or places with respect to rates or cars, nor was the legality or reasonableness of the rates in any way involved in the litigation. Neither did the plaintiffs in their petition seek to recover of any one or more of the defendants, damages resulting from a failure or refusal to furnish cars in which to transport the cattle beyond the line of any such defendant.

While the petition discloses that the cattle tendered for shipment at Kenna, N. M., were destined for Kansas City and St. Joe, Missouri, no demand was made for cars in which to carry the cattle beyond the line of any of the defendants furnishing such cars.

On the contrary, the plaintiffs' cause of action is predicated on the failure of the defendants to furnish any cars whatever for the movement of the cattle from the point where the shipment originated over any part of the line. The right of the plaintiffs to demand, and the duty of the defendants to furnish cars wherein to ship said cattle from the point of origin to their final destination was not raised by the pleadings, and no such issue was in fact tried or determined.

For plaintiffs' cause of action as set out in their petition see transcript of record, pages 4 to 7. In the preliminary part of

their petition, the plaintiffs charged that the several defendants at the time these cattle were tendered for shipment were, and that for many years they had been engaged in operating, as agents and partners of each other, under the domination and control of the Atchison, Topeka & Santa Fe Railway Company, their several lines of railway as a single through line extending through the station of Kenna, N. M., and thence through the States of Texas, Oklahoma, Kansas and Missouri to Kansas City and St. Joe in the State last named. See transcript of record, pages 2 to 4.

The several defendants after demurring to the jurisdiction of the court, denied the allegation of partnership. Transcript of record, 7 to 12. An issue of fact was thus raised, which was tried as such and which was determined adversely to the defendants. The proof upon this issue was so conclusive that the trial judge declined to submit it to the jury. See the court's charge and charges refused, transcript of record, 15 to 24.

This action of the trial court was approved by the Court of Civil Appeals. That court said, "Those assignments complaining of the court's action with reference to the pleas of privilege interposed by some of the appellants are disposed of in our conclusion that the undisputed evidence is such as to show that all of the appellants were partners and agents of each other and had a common agent in Deaf Smith County in such a manner as to make them all subject to the jurisdiction of the District Court of that County." Transcript of record, 33 and 34.

This finding of fact by the Court of Civil Appeals the Supreme Court declined to review, because the grounds of error complaining of such finding were not presented as required by the rules of the court.

The court said, "The second and third grounds are not presented in compliance with the rules of court and will not be considered." Transcript of record, 77. These grounds are found on pages 42 and 44 of the transcript. With reference to the eighth ground (transcript, 63) the court said, "The eighth assignment presents no issue in such form as would enable this court to decide it. Transcript, 78.

The rule referred to in so far as it is applicable to the question presented reads as follows, viz: "Applications for writ

of error shall embrace specific assignments of error confined to the points of law presented in the motion for rehearing in the Court of Appeals, and also presented in the motion for a new trial in the trial court. Each ground of error must be presented separately by an assignment stating succinctly and clearly the grounds of error relied on. If it be claimed that the court committed a like error of law in more than one instance all such errors may be presented under one assignment by separate propositions. If the assignment of error be not a proposition of law within itself, then it shall be followed by such propositions as may be necessary to present the question for decision by this court. Each assignment of error may be followed by a statement of facts upon which the applicant relies to show that the decision of the court is erroneous.

If the facts cited in the statement be not embraced in the opinion of the court, then the applicant shall refer to the page and line of the statement of facts upon which he relies, giving the page and line on which the statement begins and on which it ends, omitting all facts not relevant to the proposition." See rule 1 of the State Supreme Court. The second, third and eighth grounds of error as set out in the petition to the Supreme Court for a writ of error, and as copied in the transcript of record filed in this court, are the only assignments which question the jurisdiction of the State courts. It thus affirmatively appears from the record that the question of the jurisdiction was never properly presented to and that it was never in fact considered by the State Supreme Court, otherwise by overruling a motion for a rehearing which merely complained that: "This court erred in overruling the eighth ground of error presented on pp. 39 to 43 in the petition for writ of error as well as erred in that part of the opinion which says, "The eighth assignment presents no issue in such form as would enable this court to decide it and the ninth is of like character and they will not be considered." Transcript of record, 81.

PROPOSITIONS OF LAW.

FIRST: To maintain the jurisdiction of this court it must appear from the transcript of the record, (1) that some right, privilege or immunity is claimed under a statute of the

United States; (2) that such right, privilege or immunity was seasonably and specifically set up and claimed in the State courts and, (3) that the decision of the highest court of the State was against same.

Fed. Stat. Ann. Vol. 4, p. 467, et Seqr,, Sec. 709 and notes.

SECOND: The findings and conclusions of the State courts upon all questions of fact are binding upon this court and the sufficiency of such facts to support the judgment rendered will not be inquired into by this court upon a writ of error.

Dower vs. Richards, 151 U. S. 658, 53 L. Ed., 305 to 310.
Chrisman vs. Miller, 197 U. S. 313, 49 L. Ed., 770.
King vs. West Virginia, 216 U. S. 92, 54 L. Ed., 396.
Waters-Pierce Oil Co. vs. Texas, 212 U. S., 86; 53 L. Ed. 417.
Rankin vs. Emigh, 218 U. S. 27, 54 L. Ed. 915.

THIRD: Under the Texas practice, where the evidence, introduced upon any issue of fact, is of such cogency as to conclusively establish such fact, the trial court should, in his charge to the jury, assume the existence of such fact, and refuse to submit it to the jury for their determination.

Texas & Pacific Ry. Co. vs. McCoy, 90 Tex., 264.
G., C. & S. F. Ry. vs. Rowland, 90 Tex., 365.
I. & G. N. Ry. Co. vs. Culpepper, 90 Tex., 627.

FOURTH: The finding of the Court of Civil Appeals to the effect that, "The undisputed evidence is such as to show that all the appellants were partners and agents of each other and had a common agent in Deaf Smith County in such manner as to make them all subject to the jurisdiction of the court of that county," is conclusive of the fact thus found; not only on the State Supreme Court but on this court as well.

STATEMENT.

Article 1590 (formerly Article 996) of the Revised Civil Statutes of Texas, defining the jurisdiction of the Courts of Civil Appeals, is as follows, viz: "The judgment of the Courts

of Civil Appeals shall be conclusive in all cases on the facts of the case."

Vernon's Sayles Texas Civil Statutes, Vol. 1, p. 807.

The State Supreme Court has uniformly held that it must accept the fact as found by the Court of Civil Appeals and its construction of the evidence, if it be fairly susceptible of two constructions.

Hunter vs. Eastman, 95 Tex., 648.
Schwingle vs. Keifer, 153 S. W., 1132.
W. U. Tel. Co. vs. Cates, 148 S. W., 281.
S. A. & A. P. Ry. Co. vs. Nertink, 101 Tex., 165.
Hugo & Co. vs. Paiz, 104 Tex., 563.

FIFTH: The right, privilege or immunity claimed, must not only be specifically set up and claimed in the State courts, but this must be done prior to the decision by the court of last resort of the State; and in the manner required by the State practice. See authorities cited in support of this proposition in Note VIII, pp. 480 to 482, Vol. 4, Federal Statutes Annotated.

SIXTH: Such a question raised for the first time in a motion for a rehearing filed in the State Supreme Court; after the final decision by that court; or in the petition to this court for writ of error comes too late and will not confer jurisdiction on this court.

Fosters Fed. Practice, 5th Ed., Vol. 111, p. 2405, Note 66.
Texas & Pacific Ry. Co. vs. Southern Pac. Ry. Co., 137 U. S., 48; 34 L. Ed., 614.
Turner vs. Richardson, 180 U. S., 87; 45 L. Ed., 438.
McCorquodale vs. Texas, 211 U. S., 423; 53 L. Ed., 269.
Waters-Pierce Oil Co. vs. Texas, 212 U. S., 112; 53 L. Ed., 431.
Forbes vs. State Council, etc., 216 U. S., 396; 5 L. Ed., 534.

SEVENTH: Federal questions which the highest State court is by its settled practice justified in disregarding, either because not assigned or not noticed or relied upon in the

brief or argument of counsel will not serve as a basis of a writ of error from the Federal Supreme Court.

Hulbert vs. Chicago, 202 U. S., 275; 50 L. Ed., 1026.
Cox vs. Texas, 202 U. S., 446; 50 L. Ed. 1099.
Western Electrical Supply Co. vs. Abbeville Electrical L. & P. Co., 197 U. S., 299; 49 L. Ed., 765, 766.
Cincinnati & Ohio Ry. Co. vs. Slade, 216 U. S., 78; 54 L. Ed., 390.
Western Union Tel. Co. vs. Wilson, 213 U. S., 52; 53 L. Ed., 693.
Leathe vs. Thomas, 207 U. S., 93; 52 L. Ed., 118.
Yazoo Ry. Co. vs. Adams, 180 U. S., 1; 45 L. Ed., 395.

EIGHTH: This court, in an action at law, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a federal question would or would not be presented according to the way in which the question of fact was decided.

Dower vs. Richards, 151 U. S., 658; 38 L. Ed., 305, 309.

NINTH: It is not enough that such right, privilege or immunity was thus set up and claimed, but it must be made manifest either that the right was denied or that the judgment could not have been rendered without denying it.

Western Union Tel. Co. vs. Wilson, 213 U. S., 52; 53 L. Ed., 693.

TENTH: This court will not take jurisdiction of a cause where the judgment of the State court rests on two grounds, one of which does not involve a federal question or where it does not appear on which of two grounds the judgment was based, and the non-federal ground in itself is sufficient to sustain the judgment.

Allen vs. Arguimbau, 198 U. S., 149; 49 L. Ed., 990.
Waters-Pierce Oil Co. vs. Texas, 212 U. S., 112; 53 L. Ed., 431.
Western Union Tel. Co. vs. Wilson, 213 U. S., 52; 53 L. Ed., 693.
Arkansas Southern Ry. Co. vs. German Nat'l Bank, 207 U. S., 270; 52 L. Ed., 201.
Leathe vs. Thomas, 207 U. S., 93; 52 L. Ed., 93.
Vandalia Ry. Co. vs. Indiana, 207 U. S., 359; 52 L. Ed., 246.

ELEVENTH: The plaintiffs' cause of action as declared on in their petition was based on, and grew out of the breach by defendants of their common law duty, to furnish at the point of origin of the shipment, after due and reasonable notice so to do, a sufficient number of suitable cars wherein to ship the cattle, then and there tendered for shipment.

Such a breach of duty was not such a violation of the interstate commerce act as was cognizable alone by the United States Court to the exclusion of the State courts.

Re Winn, 213 U. S., 458; 53 L. Ed., 873, 874.
Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 208; 55 L. Ed., 183.
G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 481; 65 L. Ed., 516.

TWELFTH: Notwithstanding the breach of duty on the part of the defendants, of which plaintiffs complain and for which they seek to recover damages, may have been inhibited by, and may constitute a violation of the interstate commerce law, the State courts are not deprived of jurisdiction over such a cause of action, but such jurisdiction is expressly recognized by Section 22 of the act of February 4, 1887, and by paragraph 7 of the act of June 29, 1906, amending Section 20 of the act of 1887.

G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 481; 56 L. Ed., 516. Also authorities cited in note to said decision.
Adams Express Co. vs. Crominger, 226 U. S., 491; 57 L. Ed., 314, 320.
Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 208; 5 L. Ed., 185.

BRIEF OF ARGUMENT.

The plaintiffs in error, as grounds for the writ of error applied for and granted herein, assert,

FIRST: "That the Supreme Court of the State of Texas erred in overruling and failing to sustain the eighth ground of error set up in that court and paragraph (b) thereof which was as follows:

(b) The facts show that the court is without jurisdiction over the subject matter in controversy herein, in that it shows that the four defendants are four distinct corporations, owning four distinct lines of road, each located in separate states and territories and that they are not partners.

SECOND: That the Supreme Court of the State of Texas erred in assuming jurisdiction and rendering judgment herein in favor of defendants in error and in failing to sustain the proposition presented by plaintiffs in error in that court to the effect that the Circuit Court (now District Court) of the United States has exclusive jurisdiction over the subject matter in controversy to the exclusion of the State courts.

THIRD: That under the complaint filed herein and evidence adduced, the State courts are without jurisdiction to grant any relief, as under the act to regulate interstate commerce above specified the exclusive jurisdiction to hear and determine complaints and render judgment on causes of action such as are herein declared upon, is vested exclusively in the Circuit Court (now District Court) of the United States and the Interstate Commerce Commission, and there was and is, no power in the State courts to render the judgment that has herein been affirmed."

FOURTH: This is a repetition of the third ground of error.

FIFTH: That the Supreme Court of Texas erred in holding that a portion of the damages sued for were recoverable on the ground of the express contract and undertaking of the defendants, because such contract and undertaking would be and is invalid and contrary to the provision of the Federal Interstate Commerce Law. Transcript of record, 90-91. To these several grounds of error we reply: First, The plaintiffs' petition charged, the evidence proved, and the State courts found as a fact, that the several defendants (plaintiffs in error) at the time the applications for cars where to ship the cattle, were made, and at the time the cattle were tendered for shipment, were engaged in operating, as agents and partners each of the other, under the domination and control of the Atchison, Topeka & Santa Fe Railway Company, their several lines of railway as a single through line, extending through and from the station of Kenna, N. M., thence to

Kansas City and St. Joe, Missouri, and that all of such defendants had a common agent in Deaf Smith County in such manner as to make them all subject to the jurisdiction of the District Court of that county.

The fact thus found must be regarded as established, and the several defendants must be treated as a single carrier operating a single through line of railway extending from the point of origin to the destination of the shipment.

G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 491, 492; 56 L. Ed., 523.

With this fact established, the first ground of error submitted by plaintiffs in error, is manifestly without merit. Moreover this ground of error as presented to the State Supreme Court was not presented in the manner prescribed by the rules of that court, in that, (a) it was only one paragraph of an assignment of error presented to the Court of Civil Appeals and which complained in a single assignment of numerous other errors alleged to have been committed by the trial court; (b) the proposition submitted under sub-division (b) of said assignment was not germane thereto, (c) neither the assignment nor the proposition was followed by such a statement as was required by the rules of the court; wherefore, this ground of error was properly disregarded by the court. Transcript of record, 29 to 32, 63, to 66.

SECOND: The second, third and fourth grounds of error submitted to this court present for decision substantially the same propositions of law, viz:

FIRST.

That under the facts of this case as developed and established on the trial in the State courts, exclusive jurisdiction thereof was, by the Interstate Commerce Law and the amendments thereto, vested in the United States Circuit Court, and the Interstate Commerce Commission; wherefore the State courts were without jurisdiction to render any judgment whatever in the case.

SECOND.

That any judgment rendered by the State courts is void for want of jurisdiction over the subject matter of the suit.

THIRD.

That such judgment being void for want of jurisdiction, it is subject to collateral attack and may be reversed on writ of error to this court notwithstanding the questions of law thus raised were never properly presented to, or decided by the State Supreme Court.

Plaintiffs in error assert the affirmative of these propositions, and in so doing contend (1) That the right of the plaintiff to demand and the duty of the defendants to furnish, cars for the shipment of the cattle, was created by the Interstate Commerce Act and amendments thereto, and that no such right or duty existed either at common law or by statute until same was created by the act mentioned; (2) That the failure of the defendants to furnish the cars when demanded, was a violation of that act and that the plaintiffs' right of redress must necessarily be based on such act; (3) that exclusive jurisdiction to enforce such right was by the express terms of the act, or by necessary implication vested in the United States Circuit Court and Interstate Commerce Commission, to the exclusion of the State courts; (4) That any judgment rendered in such a case by a State court is void for want of jurisdiction and hence is subject to collateral attack. Let us examine these several contentions. Keeping in view the fact established by the evidence, that all of the defendants were engaged in operating their several lines of railway, as agents and partners, and as a single through line from the point of origin to the destination of the shipment; were they not by the common law charged with the duty of exercising ordinary care to furnish, within a reasonable time, after receiving notice so to do, a sufficient number of suitable cars wherein to ship the cattle, when tendered for shipment? This proposition is so elementary that we deem it unnecessary to cite authorities in support of it. Moreover the statute of the State of Texas in force at the time the cattle in question were tendered for shipment

provided as follows, viz: "It is hereby declared to be the duty of every railroad company operating a line of railroad within this State to provide sufficient tracks, switches, sidings, yards, depots and other facilities for receiving and delivering freight, motive power, cars and other needful facilities and appliances to enable it, with reasonable dispatch, to perform all of its duties as to all traffic which, with ordinary foresight and diligence, could be anticipated as a common carrier, and to furnish all necessary and suitable cars and vehicles of transportation for all freight offered or tendered to it for shipment, within a reasonable time after demand therefor made by any shipper of such freight. Sec. 1, Chap. 14a, Supplement 1908-1910, Sayles' Texas Civil Statutes, page 331.

The statutes of New Mexico then in force provided as follows:

Sections 3862 and 3863, Compiled Laws of New Mexico, of 1897 (being Sections 4 and 5 of Chapter 8 of an Act approved February 2, 1878).

> Section 3862. Every corporation formed under this act shall start and run its cars for the transportation of persons and property at such regular times as it shall fix by public notice, and shall furnish sufficient accommodations for all such persons and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and the junction of other railroads and stopping places established for taking and leaving persons and property, and shall transport between such places all such persons and property, on the payment of its lawful charges therefor; provided, such corporation may decline to receive any person afflicted with any contagious disease, or otherwise unfit to be admitted into its cars.
>
> Sec. 3863. In case any corporation formed under this act shall refuse to transport persons or property as provided in the preceding section, or to leave the same at the place of destination, it shall pay to the party aggrieved all damages he or she shall sustain thereby.

Chapter 79, Section 101, Session Acts of 1905, has the following:

"Foreign corporations, including railroad and telegraph corporations having complied with the law shall have the same powers and be subject to all liabilities and duties as corporations of a like character organized under the laws of this territory; but they shall have no other or greater powers."

Do the provisions of the Interstate Commerce Act, abrogate or render inoperative, as applied to interstate shipments the statutes referred to, or prohibit shippers from enforcing their common law rights to recover damages resulting from the defendants' negligence in failing to furnish cars? This depends on whether or not such statutes and the enforcement thereof, and such common law rights are inconsistent with the provisions of the Interstate Commerce Act.

T. & P. Ry. vs. Abilene Cotton Oil Co., 204 U. S., 426; L. Ed., 51, 553.

That such is not the case is we think conclusively established by the decisions rendered by this court in the case last cited and in the following cases, to-wit:

G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 481; 56 L. Ed., 516, 522, 523.

Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 186, 208; 55 L. Ed., 183.

Re Winn, 213 U. S., 458, 459; 53 L. Ed., 873, 874.

These cases hold, "That damage caused by defendants' negligence in failing to transport and deliver goods received for interstate shipment" was in no way tracable a violation of the statute, and is not therefore within the provisions of Sections 8 and 9 of the act to regulate commerce. They also hold that the State courts have jurisdiction of such causes of action. If this be true, why have not such courts jurisdiction of an action to recover damages occasioned by the negligence of the carriers in failing to furnish cars for an interstate shipment? Such a failure is just as much a breach of a common law duty as is a failure to safely transport and deliver such a shipment after receiving it, and if jurisdiction exists in the one case, we see no reason why it does not also exist in the other. But is it true that the State courts have no jurisdiction to enforce a cause of action created by, and based on a statute of the United States?

That such jurisdiction may and generally does exist has been repeatedly held by this court. See authorities cited above, also

Adams Express Co. vs. Crominger, 226 U. S., 491; 57 L. Ed., 314, 320.
G. H. & S. A. Ry. vs. Piper, 115 S. W., 107.
Shoshone Mining Co. vs. Rutter, 177 U. S., 505, 507; 44 L. Ed., 864.
Nelson vs. Ry. Co., 168 Fed., 982.

Section 22 of the Interstate Commerce Act reads in part as follows, viz: "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The Carmack amendment to Section 20 of said act provides "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

It seems to us that these authorities conclusively show that the State court had jurisdiction to try and determine this cause and that the judgment rendered by such court is not void for want of jurisdiction to render same.

Replying to the fifth assignment of error submitted by plaintiffs in error, we submit same should not be considered by this court because, (1) It does not appear from the transcript of record filed herein that the question presented by this assignment was ever called to the attention of the State Supreme Court, or that that court ever decided same; (2) The decision of that question was not necessary to the validity of the judgment complained of; (3) The validity of such a contract depends on the facts of the particular case, and this court has no jurisdiction to revise the rulings of the State courts on such question of fact.

This alleged error was not complained of either in the motion for a rehearing filed in the State Supreme Court or in the petition for writ of error to this court. Transcript of record, 80, 81, 83, 84.

If these objections should be overruled and said assignment considered, then we submit that the Interstate Commerce

Act does not prohibit interstate carriers from agreeing to furnish shippers of interstate freight, within a reasonable time after receiving notice so to do, a sufficient number of cars wherein to transport such freight.

A contract so made is valid and same may be enforced by the State courts. See Interstate Commerce Act.

Adams Express Co. vs. Crominger, 226 U. S., 491; 57 L. Ed., 314.

Missouri, Kansas & Texas Ry. Co. vs. Harriman, 227 L. Ed., 657; 57 L. Ed., 690.

Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 186; 55 L. Ed.

In conclusion we submit that the single question presented for the decision of this court is, whether or not exclusive jurisdiction to try and determine such a cause of action was, by the Interstate Commerce Act vested in the Federal Courts and in the Interstate Commerce Commission to the exclusion of the State courts, in such sense as to render any judgment rendered by the State courts void for want of jurisdiction over the subject matter of the suit. We believe that the authorities which we have cited above conclusively answer this question in the negative, and that the writ of error herein should be dismissed for want of jurisdiction in this court and we so pray. But if this cannot be done, then we pray that the judgment rendered in the State courts be in all things affirmed.

Respectfully submitted,

W. A. DUNN,

J. A. TEMPLETON,

Attorneys for George W. Littlefield, J. P. White and Thomas D. White, Composing the firm of Littlefield Cattle Co., defendants in error.

D. T. BOMAR,

Of Counsel for defendants in error.

EASTERN RAILWAY COMPANY OF NEW MEXICO *v.* LITTLEFIELD.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 320. Submitted March 1, 1915.—Decided April 5, 1915.

Penna. R. R. v. *Puritan Mining Co.*, *ante*, p. 121, followed to effect that under the proviso of § 22 of the Act to Regulate Commerce the state courts by virtue of their general jurisdiction can determine the right of a shipper to recover damages from the carrier for its failure to supply a reasonable number of cars after it had accepted the order, although a car shortage existed of which it had knowledge but did not notify the shipper.

While a carrier may be relieved from performing a service by reason of conditions arising without fault on its part, it must promptly notify shippers of its inability, or the reception of goods without notice will estop the carrier from setting up what might be a sufficient excuse.

Where the record does not contain the evidence and there are no findings of fact, the verdict of the jury in favor of the plaintiff must be construed to mean that the evidence sustained the material allegations of the complaint.

The liability of a carrier for failing to furnish a reasonable number of cars for an accepted shipment becomes fixed when the goods are tendered and the carrier fails to furnish the facilities needed, and that liability cannot be avoided by proving a car shortage for which the carrier was not responsible but of which it gave no notice to the shipper.

Whether a carrier is liable at common law as forwarders of freight to be delivered to connecting carriers outside the State and whether associated carriers are so associated as to be jointly and severally liable are not Federal questions and are concluded by the decision of the state court.

Writ of error to review 154 S. W. Rep. 543, dismissed.

THE facts are stated in the opinion.

Mr. A. H. Culwell, *Mr. Gardiner Lathrop*, and *Mr. Robert Dunlap* for plaintiff in error, submitted.

Mr. W. A. Dunn, *Mr. J. A. Templeton*, and *Mr. D. T. Bomar* for defendant in error, submitted:

Federal questions which the highest state court is by its settled practice justified in disregarding, either because not assigned or not noticed or relied upon in the brief or argument of counsel will not serve as a basis of a writ of error from the Federal Supreme Court. *Hulbert* v. *Chicago*, 202 U. S. 275; *Cox* v. *Texas*, 202 U. S. 446; *Western Electrical Co.* v. *Abbeville Electrical Co.*, 197 U. S. 299; *Cin. & Ohio Ry.* v. *Slade*, 216 U. S. 78; *West. Un. Tel. Co.* v. *Wilson*, 213 U. S. 52; *Leathe* v. *Thomas*, 207 U. S. 93; *Yazoo Ry.* v. *Adams*, 180 U. S. 1.

This court, in an action at law, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided. *Dower* v. *Richards*, 151 U. S. 658.

It is not enough that such right, privilege or immunity was thus set up and claimed, but it must be made manifest either that the right was denied or that the judgment could not have been rendered without denying it. *West. Un. Tel. Co.* v. *Wilson*, 213 U. S. 52.

This court will not take jurisdiction of a cause where the judgment of the state court rests on two grounds, one of which does not involve a Federal question or where it does not appear on which of two grounds the judgment was based, and the non-Federal ground in itself is sufficient to sustain the judgment. *Allen* v. *Arguimbau*, 198 U. S. 149; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *West. Un. Tel. Co.* v. *Wilson*, 213 U. S. 52; *Arkansas Southern Ry.* v. *German Nat'l Bank*, 207 U. S. 270; *Leathe* v. *Thomas*, 207 U. S. 93; *Vandalia Ry.* v. *Indiana*, 207 U. S. 359.

The plaintiffs' cause of action as declared on in their petition was based on, and grew out of the breach by defendants of their common law duty, to furnish at the point

of origin of the shipment, after due and reasonable notice so to do, a sufficient number of suitable cars wherein to ship the cattle, then and there tendered for shipment.

Such a breach of duty was not such a violation of the interstate commerce act as was cognizable alone by the United States court to the exclusion of the state courts. *Re Winn*, 213 U. S. 458; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 208; *G. H. & S. A. Ry.* v. *Wallace*, 223 U. S. 481.

Notwithstanding the breach of duty on the part of the defendants, of which plaintiffs complain and for which they seek to recover damages, may have been inhibited by, and may constitute a violation of the interstate commerce law, the state courts are not deprived of jurisdiction over such a cause of action, but such jurisdiction is expressly recognized by § 22 of the act of February 4, 1887, and by par. 7 of the act of June 29, 1906, amending § 20 of the act of 1887. *G. H. & S. A. Ry.* v. *Wallace*, 223 U. S. 481; *Adams Express Co.* v. *Crominger*, 226 U. S. 491; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 208.

Mr. Justice Lamar delivered the opinion of the court.

The plaintiffs in error jointly operate the Santa Fe system of railway lines extending through Arizona, Texas, Kansas and Oklahoma into Missouri. The Littlefield Cattle Company owns ranches near these roads and brought suit for damages caused by their failure to furnish cars needed for the transportation of cattle from points in Texas to points in Missouri.

The Cattle Company's declaration averred that finding in the spring of 1907 that it would need 200 cars in which to ship cattle to market it requested the carriers' station agent in May, 1907, to furnish these cars in lots of 50, at designated places on designated dates in September and October, 1907. The defendants accepted the order and

plaintiff relying on the duty and promise brought 3900 head of cattle to the station at the time stated and tendered the same for shipment. The defendants refused to furnish the cars needed. Plaintiff was consequently forced to hold the cattle under herd for several weeks awaiting the arrival of cars wherein to ship the same. On October 18, 1907 plaintiff learned for the first time definitely that defendants would not furnish cars until several weeks thereafter, whereupon plaintiff was forced to abandon the shipment and return the herd to the ranch in Texas which was distant from the station about 100 miles. By reason of the expense and loss of the market plaintiffs were damaged $35,000.

Each Railway Company demurred specially on the ground that it could not be required to furnish cars to go beyond its line in interstate shipment; and insisted that if plaintiff had any right of action it arose under the Commerce Act and the United States courts had exclusive jurisdiction of the suit. The demurrer was overruled. There was a verdict for the plaintiff and, the judgment thereon having been affirmed by the Supreme Court of Texas, the case is here on a writ of error in which the assignments are said to present two questions involving the construction of the act to regulate commerce.

1. The decision in *Penna. R. R.* v. *Puritan Coal Mining Company*, just decided, *ante*, p. 121, makes it unnecessary to do more than repeat that, under the proviso to § 22 of the Commerce Act, the state courts by virtue of their general jurisdiction can determine the right of a shipper to damages for failure to supply cars in cases like that presented by the plaintiff's pleading in the present suit. There was, therefore, no error in overruling the defendant's demurrer.

2. It is claimed that a Federal question, and one calling for the exercise of the administrative function of the Commission, was raised by the contention in defendants'

answer that plaintiffs' demand for cars was unreasonable and as the defendants were unable to comply with the demand they are not liable for failure to furnish the cars within the time, as alleged.

This contention is based on the averment in the answer that the defendant's lines were adequate for the needs of the sparsely settled country through which they ran 'until the — day of ———, 1907 when an unprecedented rush of settlers to the southwest created an unprecedented demand for transportation facilities of all kinds, including cars for live stock.' It was also averred that during the year 1907 there was a car shortage throughout the country and "It was impossible for the defendants to have furnished the cars demanded by the plaintiffs without neglecting other demands and discriminating against other persons and firms contrary to the provisions of the Federal law regulating interstate commerce." There is complaint made of the rulings of the trial judge relating to this defense.

But whatever may be the rights and remedies of the parties and the jurisdiction of the Commission, in such cases, it is certain that the defendants' answer does not meet the issue nor set out facts which would constitute a defense against the cause of action alleged in the plaintiffs' pleading. For the answer indicates that the car shortage was known to the carriers when the plaintiffs demanded cars to be furnished in September and October. There is no allegation that in May the carrier objected that the demand was unreasonable in the time that it was made or in the number of cars that were demanded. Nor was there any claim that the want of equipment was brought to the attention of the Cattle Company, or that it was notified that conditions were such as to make it impossible for the carriers to agree to furnish cars at the time and place designated. If such information had then been given to the shipper, or promptly upon subsequent dis-

covery that the defendants would be unable to supply the cars, a different question would have arisen. But, where, without fault on its part, a carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability, otherwise the reception of goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods or for delay in shipment after they had been received. The evidence is not set out in the record and there are no findings of fact, but the verdict of the jury must be construed to mean that the evidence sustained the material allegations of the complaint and showed that the defendants had negligently failed to furnish cars promised.

Thus construed it appears that the plaintiff in May gave the carriers notice that it would need 200 cars in the following September and October to be used in the shipment of cattle from Texas to Missouri. The offer was accepted and a statement was made that the cars would be on hand at the time and place named. Relying thereon the Cattle Company drove its herd a long distance across the country and at great expense kept them at the station until definitely notified that they could not be shipped for several weeks. In the meantime great expense had accrued, the market was lost and the cattle had to be driven 100 miles back to the ranch.

The liability of the carriers under these facts, and in the absence of a showing of new facts establishing an excuse, became fixed when the cattle were tendered for shipment and the carrier failed to furnish the facilities needed. That liability cannot now be avoided by proof that the failure to furnish cars was occasioned by a shortage for which the carriers may not have been responsible but as to which they failed to give timely notice to the shipper.

The question as to whether at common law these railroads were liable as forwarders of freight to be delivered

to connecting carriers outside the State; and whether the railways were so associated as to make them jointly and severally liable are matters concluded by the decision of the Supreme Court of Texas. There is no merit in the Federal question relied on and the writ of error is

Dismissed.